No. 97-2044-CFX Title: United States, Petitioner
v.
Haggar Apparel Company

Docketed: June 19, 1998 Court: United States Court of Appeals for the Federal Circuit

Entry	Date	Proceedings and Orders
	May 7 1998	Application (A97-835) to extend the time to file a petition for a writ of certiorari from May 21, 1998 to June 20, 1998, submitted to The Chief Justice.
	May 7 1998	Application (A97-835) granted by the Chief Justice extending the time to file until June 20, 1998.
	Jun 18 1998	Petition for writ of certiorari filed. (Response due August 17, 1998)
	Jul 8 1998	Order extending time to file response to petition until August 17, 1998.
	Aug 17 1998	Brief of respondent Haggar Apparel Company in opposition filed.
	Sep 2 1998	Reply brief of petitioner United States filed.
	Sep 9 1998	DISTRIBUTED. September 28, 1998
	Sep 29 1998	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT January 11, 1999. **********
	Nov 9 1998	Brief of petitioner United States filed.
	Nov 9 1998	Joint appendix filed.
	Nov 23 1998	CIRCULATED.
	Nov 30 1998	Record filed.
	Dec 7 1998	Brief amicus curiae of Customs and International Trade Bar Association filed.
	Dec 8 1998	Brief amici curiae of Ahydrides & Chemicals, Inc., et al. filed.
	Dec 8 1998	Brief of respondent Haggar Apparel Co. filed.
	Dec 16 1998	Supplemental brief of respondent Haggar Apparel Company filed.
	Dec 28 1998	Reply brief of petitioner United States filed.
	Jan 11 1999	ARGUED.

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

HAGGAR APPAREL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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58 pp

QUESTIONS PRESENTED

1. Whether regulations issued by the Treasury Department under the Tariff Act are entitled to deference in determining the proper tariff classification of imported goods.

2. Whether 19 C.F.R. 10.16(c) reasonably interprets the statutory phrase "operations incidental to the assembly process" in Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States to exclude the "permapressing" of items of clothing assembled abroad.

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is reported at 127 F.3d 1460. The opinion of the Court of International Trade (App., *infra*, 7a-24a) is reported at 938 F. Supp. 868.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1997. A petition for rehearing was denied on February 20, 1998 (App., *infra*, 5a-6a). On May 7, 1998, the Chief Justice extended the time for filing a petition for a writ of certiorari to June 20, 1998. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 28 U.S.C. 2643(b) provides:

> If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.

2. General Headnote 11 of the Tariff Schedules of the United States, 19 U.S.C. 1202, provides:

> The Secretary of the Treasury is hereby authorized to issue rules and regulations governing the admission of articles under the provisions of the schedules. The allowance of an importer's claim for classification, under any of the provisions of the schedules which provide for total or partial relief from duty or other import restrictions on the basis of facts which are not determinable from an examination of the article itself in its condition as imported, is dependent upon his complying with any rules or regulations which may be issued pursuant to this headnote.

3. Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. 1202, provides that, with respect to:

> Articles * * * assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting[, the duty that is to be paid is to be calculated] upon the full value of the imported article, less the cost or value of such products of the United States * * * .

4. 19 C.F.R. 10.16(c) provides:

> Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article. The following are examples of operations not considered incidental to the assembly as provided under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202):
>
> (1) Melting of exported ingots and pouring of the metal into molds to produce cast metal parts;
>
> (2) Cutting of garment parts according to pattern from exported material;
>
> (3) Painting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics;

(4) Chemical treatment of components or assembled articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles;

(5) Machining, polishing, burnishing, peening, plating (other than plating incidental to the assembly), embossing, pressing, stamping, extruding, drawing, annealing, tempering, case hardening, and any other operation, treatment or process which imparts significant new characteristics or qualities to the article affected.

STATEMENT

1. Haggar Apparel Company brought this suit in the United States Court of International Trade to recover customs duties paid under protest in 1988 and 1989. The duties were paid by Haggar in connection with the importation of slacks that had been assembled in Mexico from components manufactured in the United States. While in Mexico, the garments had also been subjected to a "permapressing" operation that involved the pressing and oven baking of components to which a chemical resin had been applied. This process is designed to make the garment wrinkle-free and thus to eliminate the need for ironing after laundering (App., *infra*, 8a-9a). As the trial court stated, "The most important performance characteristics of [the Haggar] pants are crease retention and seam and surface flatness; the pants are 'wash and wear' garments" (*id.* at 8a).

Under Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. 1202,

an importer is entitled to a partial duty allowance for:[1]

> Articles * * * assembled abroad in whole or in part of fabricated components, the product of the United States, which * * * (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.

Pursuant to authority conferred on the Secretary of the Treasury "to issue rules and regulations governing the admission of articles under the provisions of the schedules" (19 U.S.C. 1202, General Headnote 11), the Treasury has specified by regulation that "[a]ny significant process, operation, or treatment other than assembly whose primary purpose is the * * * physical or chemical improvement of a component * * * shall not be regarded as incidental to the assembly" and therefore does not qualify for the duty exemption. 19 C.F.R. 10.16(c). Under this standard, the duty exemption is specifically not available when any "[c]hemical treatment" has been applied to "articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles" (19 C.F.R. 10.16(c)(4)).

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[1] Pursuant to 19 U.S.C. 3004, the Harmonized Tariff Schedule of the United States (HTSUS) was implemented into law on January 1, 1989. The HTSUS supplanted the former provisions of the Tariff Schedule of the United States (TSUS) on that date. Item 807.00 of TSUS, which applied prior to January 1, 1989, is identical to Subheading 9802.00.80 of HTSUS. References in this petition to Subheading 9802.00.80 of HTSUS thus apply equally to Item 807.00 of TSUS.

The "permapressing" that Haggar applied to the garments in Mexico thus disqualifed them from duty-free reentry under the direct text of the regulations. Haggar paid the required duties and then brought this refund suit in the United States Court of International Trade (App., *infra*, 7a, 9a).

2. The United States Court of International Trade has exclusive jurisdiction to review protests from Customs Service determinations. 28 U.S.C. 1581(a). The court rejected the Customs Service determination in this case and directed that the duties be refunded to Haggar (App., *infra*, 7a-24a, 25a-26a).

a. The Court of International Trade rejected the government's position that 19 C.F.R. 10.16(c)(4) controls this case. The court stated that the regulation is inconsistent with the "plain language" of the statute, which "does not prohibit operations which merely *impart new characteristics* to the article being assembled as the regulation provides, but in fact permits a duty allowance for such improvements to the articles so long as the operation imparting those characteristics was incidental to assembly" (App., *infra*, 23a). The court rejected the agency's assertion that its regulatory interpretions of the Tariff Act are entitled to deference under this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). The court stated that the Federal Circuit has "declin[ed] to apply *Chevron* deference to Customs in routine classification decisions" (App., *infra*, 23a, citing, *e.g.*, *Crystal Clear Industries* v. *United States*, 44 F.3d 1001, 1003 (Fed. Cir. 1995)) and has even "ignored the regulation altogether" (App., *infra*, 23a, citing *Chrysler Corp.* v. *United States*, No. 95-1366, 1996 WL 132263, at *2 (Fed. Cir. Mar. 22, 1996); *General Motors*

Corp. v. *United States*, 976 F.2d 716, 718 (Fed. Cir. 1992); *United States* v. *Oxford Industries, Inc.*, 668 F.2d 507 (C.C.P.A. 1981); *United States* v. *Mast*, 668 F.2d 501, 506 (C.C.P.A. 1981)).

The court explained that it would not give deference to the agency's regulations under the Tariff Act because 28 U.S.C. 2643(b) directs the Court of International Trade "to reach the correct decision" (*ibid.*) in the cases that come before it. The court stated that this "statutory obligation to find the correct result limits the court's ability to give special *Chevron* deference" to the Treasury regulations issued under the Tariff Act (App., *infra*, 23a-24a, quoting *Anval Nyby Powder AB* v. *United States*, 927 F. Supp. 463, 469 (Ct. Int'l Trade 1996)).

b. Having thus rejected any role for the agency's regulations in interpreting the highly detailed classifications contained in the Tariff Act, the court found it necessary to apply a set of judicially created factors to determine *de novo* whether Haggar's permapressing operation is "incidental to the assembly process" and therefore within the scope of the duty exemption provided in Subheading 9802.00.80 of the Harmonized Tariff Schedule. As a source for such judicially-created factors, the court looked to the decision of the Federal Circuit in *United States* v. *Mast*, 668 F.2d at 506 & n.7. In *Mast*, the Federal Circuit held that, in determining whether a process is "incidental to assembly" for purposes of the tariff exemption, courts should consider (i) whether the cost and time required by the ostensibly "incidental" operation "may be considered 'minor'" compared to the cost and time "required for assembly of the whole article," (ii) whether the operation is "necessary to the assembly process," (iii) whether the operation

is "so related to assembly that [it was] logically performed during assembly, and (iv) whether "economic or other practical considerations dictate that the operations be performed concurrently with assembly" (App., *infra*, 11a-12a). See also *General Motors Corp.* v. *United States*, 976 F.2d 716 (Fed. Cir. 1992).

Upon reviewing the evidence and "balancing the relevant factors," the Court of International Trade concluded that the permapressing operation is "'incidental to the assembly process' within the meaning of * * * subheading 9802.00.80, HTUS" (App., *infra*, 21a). The court acknowledged that some of the relevant "factors weigh against granting a duty allowance" because they reflect that permapresssing is not merely a "minor" adjunct to the assembly process (*id.* at 18a). For example, permapressing entails substantial additional capital costs (*ibid.*) and takes up approximately one-third of the total time involved in the foreign processing of the garments (*id.* at 19a). The court also agreed with the agency that permapressing procedures are "not necessary, nor related to assembly" (*ibid.*). The court nonetheless emphasized that, "to minimize damages and economic costs," permapressing "would logically occur" at the time of assembly (*id.* at 21a). Because "economic and practical considerations dictate" that permapressing occur "concurrent with assembly," the court concluded that the permapressing operation was "incidental to the assembly process" within the meaning of the statutory duty exemption (*ibid.*).

3. The Federal Circuit has exclusive jurisdiction to review the final decisions of the Court of International Trade. 28 U.S.C. 1295(a)(5). On appeal from the decision in this case, the Federal Circuit affirmed (App., *infra*, 1a-4a).

The court of appeals held that the Court of International Trade had properly ignored the agency's regulations and had correctly applied the *Mast* factors in determining that the permapressing of the Haggar slacks was "incidental to the assembly process" and therefore within the customs exemption (App., *infra*, 3a). The court of appeals concluded that the Treasury regulations interpreting customs classifications are legally irrelevant and are entitled to no weight (*id.* at 3a-4a):

> [T]he [trial] court properly rejected the United States' argument that Customs' regulations interpreting and applying this statute are entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). As we have recently held in several cases, the United States' argument is without merit. *See Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997) (no *Chevron* deference applies to classification decisions); *Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491-93 (Fed. Cir. 1997) ("neither this court nor the Court of International Trade defers to Custom's [*sic*] interpretation of a tariff heading on the basis of special deference pursuant to [*Chevron*]").

The court of appeals reasoned that the Treasury regulations are not entitled to the deference required by *Chevron* because "the Court of International Trade is * * * charged with the duty to 'reach the correct decision'" in the cases within its jurisdiction under 28 U.S.C. 2643(b) (App., *infra*, 4a, quoting *Rollerblade, Inc.* v. *United States*, 112 F.3d 481, 484 (Fed. Cir. 1997)).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals departs from the consistent decisions of this Court that accord deference to the formal interpretations of statutes adopted by agencies charged with their implementation. The proffered reason for this holding—that the Court of International Trade is directed to "reach the correct decision" in cases within its jurisdiction (28 U.S.C. 2643(b))—does not provide even a plausible basis for this radical departure from settled principles of administrative law. *Every* court is charged with the duty to "reach the correct decision" in the cases that come before it.

Denying deference to the Treasury regulations that interpret the detailed classification provisions of the Tariff Act has serious practical consequences. Both importers and the Customs Service are now left without effective guidance for a wide range of transactions. Under the decision in this case, the ultimate application of customs provisions often cannot be determined or even reliably predicted except upon completion of judicial proceedings that occur well after the relevant transactions have been planned and conducted. The petition for a writ of certiorari should be granted because of the clear departure of the decision below from the standards of deference required by the decisions of this Court and because of the exceptional importance of the questions presented to the planning of commercial transactions and to the administration of the customs laws.

1. a. It has long been a bedrock legal principle that courts are to accord deference to the formal interpretations of a statute adopted by the agency that has been "charged with responsibility for administering

the provision" by Congress. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering."); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921); *Brown* v. *United States*, 113 U.S. 568, 570-571 (1885); *United States* v. *Pugh*, 99 U.S. 265, 269 (1878); *Edwards's Lessee* v. *Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827). The deference that this Court has consistently accorded to agency interpretions in decisions such as *Chevron* is fully applicable here.

The regulations involved in this case were issued pursuant to the express delegation by Congress of authority to the Secretary of the Treasury "to issue rules and regulations governing the admission of articles under the provisions of the tariff schedule." 19 U.S.C. 1202, General Headnote 11 of TSUS.[2] We "have before us here a full-dress regulation, issued by the [Commissioner of Customs, with the approval of the Secretary of the Treasury,] and adopted pursu-

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[2] General Note 20 of HTSUS contains similar language. See note 1, *supra*. Congress has specified that "[t]he Customs Service shall, under rules and regulations prescribed by the Secretary," determine "the final appraisement of merchandise" and "fix the final classification and rate of duty applicable to such merchandise" (19 U.S.C. 1500(a), (b)). In enacting the HTSUS in 1988 (see note 1, *supra*), the Conference Report emphasized that "[t]he Customs Service will be responsible for interpreting and applying the Harmonized Tariff Schedules of the United States" (H. R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549-550 (1988)).

ant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 741).[3] Courts are to defer to the agency's interpretation in this setting "because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Id.* at 740-741.

This Court has frequently emphasized that substantial deference is owed to the formal Treasury regulations that interpret the highly complex and detailed revenue laws: "the task that confronts us is to decide, not whether the Treasury regulation represents the best interpretation of the statute, but whether it represents a reasonable one." *Atlantic Mutual Ins. Co.* v. *Commissioner*, 118 S. Ct. 1413, 1418 (1998). Accord *Cottage Savings Ass'n* v. *Commissioner*, 499 U.S. 554, 560-561 (1991). This high degree of deference to Treasury regulations serves the important function of enhancing predictability in the application of the often intricate and intertwined revenue provisions that shape, and indirectly govern, virtually all forms of economic activity. See, *e.g.*, *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979).

By ignoring the duly promulgated regulations in this case, the decision of the court of appeals erodes

[3] Treasury Department Order No. 165, T.D. 53160 (Dec. 15, 1952), provides that regulations under the Tariff Act "shall be prescribed by the Commissioner of Customs, with the approval of the Secretary of the Treasury."

the authority conferred on the agency by Congress to establish rules and regulations "to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties" (19 U.S.C. 1502(a)). The decision also undermines the political role of the Executive Branch in the execution of foreign trade policy. As this Court stated in *Chevron*, 467 U.S. at 865-866:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
>
> When a challenge to an agency construction of a statutory provision * * * really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.

b. The sole rationale offered by the Federal Circuit for its refusal to give any weight to the applicable Treasury regulations is that 28 U.S.C. 2643(b) directs the Court of International Trade to "reach the correct decision" in the cases within its jurisdiction (Pet. App. 4a, quoting *Rollerblade, Inc.* v. *United States*, 112 F.3d at 484). That rationale is unpersuasive for two reasons. First, it does not distinguish

the Court of International Trade from any other court, for *all* courts are obviously charged with the responsibility of "reach[ing] the correct decision" in the cases that come before them. See note 4, *infra*. Second, the provision on which the court of appeals relies, when read in its entirety, does nothing more than provide various procedural options for the Court of International Trade when that court is not satisfied with the state of the evidentiary record in the case before it. The statute states in its entirety (28 U.S.C. 2643(b)):

> If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.

This statute obviously does not provide, either in words or by plausible inference, that the traditional rule of deference to agency interpretations has no role in tariff classification disputes.[4] Courts that

[4] The Hobbs Act, which governs judicial review of orders from several independent federal regulatory agencies, contains an analogous provision that details the procedural options available to a reviewing court to supplement the evidentiary record. See 28 U.S.C. 2347. The courts that review agency decisions under the Hobbs Act have consistently followed this Court's mandate in *Chevron* and have deferred to reasonable agency interpretations of ambiguous statutory provisions. See, *e.g.*, *American Trucking Ass'ns, Inc.* v. *Federal Highway Administration*, 51 F.3d 405, 408 (4th Cir. 1995); *American Mining Congress* v. *Nuclear Regulatory Commission*, 902 F.2d 781, 784 (10th Cir. 1990); *CSX Transportation* v. *United States*, 867 F.2d 1439, 1442 (D.C. Cir. 1989).

The Administrative Procedure Act (APA) applies generally to federal agency practice and procedure. That statute directs the reviewing courts to "decide all relevant questions of law" and to "interpret * * * statutory provisions." 5 U.S.C. 706. Under the reasoning applied by the Federal Circuit in this case, that statute would arguably provide an even more authoritative basis than 28 U.S.C. 2643(b) for a reviewing court to disregard an agency's reasonable statutory interpretations. In judicial review under the APA, however, courts have consistently followed *Chevron* and deferred to agency interpretations of statutes. See, *e.g.*, *Seldovia Native Association, Inc.* v. *Lujan*, 904 F.2d 1335, 1342 (9th Cir. 1990); *Kansas City Southern Industries, Inc.* v. *Interstate Commerce Commission*, 902 F.2d 423, 430 (5th Cir. 1990).

properly apply the traditional rule of deference *do* "reach the correct decision," and those that fail in that responsibility do not.

The legislative history confirms what the language of the statute unambiguously shows: 28 U.S.C. 2643(b) is concerned only with the procedural remedies available to the Court of International Trade when a factual record is inadequate. See H.R. Rep. No. 1235, 96th Cong., 2d Sess. 60 (1980).[5] Nothing in the text or history of this statute provides support for the extraordinary conclusion of the court of appeals

[5] The House Report states (H.R. Rep. No. 1235, *supra*, at 60):

> Subsection (b) is a new provision that empowers the Court of International Trade to remand the civil action before it for further judicial or administrative proceedings. In granting this remand power to the court, the Committee intends that the remand power be co-extensive with that of a federal district court. In addition, this subsection authorizes the court to order a retrial or rehearing to permit the parties to introduce additional evidence.

(App., *infra*, 4a) that, in customs cases, the Court of International Trade need not adhere to the decision of this Court in *Chevron*. Indeed, prior to the recent Federal Circuit decisions to the contrary, the Chief Judge of the Court of International Trade had acknowledged that that court, like all others, "must defer to the agency's interpretation of the statute" if it is "sufficiently reasonable," even though "the court might have reached a different result on its own" (Chief Judge Edward D. Re, *Litigation Before the United States Court of International Trade*, 19 U.S.C.A. §§ 1-1300, at XLI (West. Supp. 1998)).

2. Under the correct standard of deference appropriate for agency interpretations of "statutes that they are charged with administering" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 739), the regulation should have been sustained. The language employed by Congress in the statutory customs exception for "operations incidental to the assembly process" (Subheading 9802.00.80 of HTSUS, 19 U.S.C. 1202) is not plain and unambiguous. And, the agency's determination that an operation such as "permapressing" is sufficiently distinct from "assembly" that it is *not* "incidental to the assembly process" is reasonable. The agency's formal regulatory interpretation of the statute should therefore have been upheld under this Court's decision in *Chevron*, 467 U.S. at 842-844.

a. Congress has not "directly spoken to the precise question [of statutory construction] at issue" in this case (*Chevron*, 467 U.S. at 842). The statute provides several specific examples of operations that are "incidental to the assembly process such as cleaning, lubricating and painting." Subheading 9802.00.80 of HTSUS, 19 U.S.C. 1202. That list of

concrete examples, however, does not address the myriad of other operations that can be performed abroad and does not indicate whether such other operations should be regarded as "incidental to the assembly process." Because Congress "left ambiguity in a statute meant for implementation by an agency," there is "a presumption that Congress * * * understood that the ambiguity would be resolved, first and foremost, by the agency" rather than by the courts. *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 740-741.

b. The question properly at issue in this case is therefore not whether the Treasury regulation "represents the best interpretation of the statute, but whether it represents a reasonable one." *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 744-745.[6] The regulation defines "assembly operations" to "consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing, or the use of fasteners" (19 C.F.R. 10.16(a)). The regulation then defines operations that are *not* incidental to the assembly process as "[a]ny significant process, operation, or treatment other than assembly" that (i) has the "primary purpose" of "the fabrication, completion, physical or chemical improvement of a component" or (ii) "is not related to the assembly process" (19 C.F.R. 10.16(c)). To provide more de-

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[6] Because the courts below applied an incorrect standard of deference in reviewing the regulation involved in this case, this Court may wish to consider summarily reversing the judgment and remanding the case to the court of appeals for that court to consider the validity of the regulation under the proper standard.

tailed guidance to the public, and to formalize the longstanding administrative position on this issue,[7] the agency listed several specific operations that are deemed *not* to be incidental to assembly under the regulation. Included among those specific examples is the "[c]hemical treatment of components or assembled articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles" (19 C.F.R. 10.16(c)(4)).[8]

That regulation constitutes a reasonable interpretation of the statute. As the courts below recognized, "permapressing" (i) is not necessary or related to the assembly of the garments, (ii) effects a significant improvement of the garments and (iii) consumes a substantial portion of the time and capital required in the foreign operations (App., *infra*, 20a-21a). By specifying that such operations are not "incidental" to assembly, the regulation gives effect to the ordinary meaning of the statutory text. A process can be "incidental" to assembly only if it occurs as "a minor

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[7] In Headquarters Ruling 027763 (Sept. 13, 1973), the Customs Service determined that permapressing is not an operation incidental to assembly for purposes of Item 807.00 of the TSUS. See note 1, *supra*.

[8] In addition to these examples, the regulation further specifies that garment cutting, decorative pairting and metalworking operations are *not* incidental to assembly. 19 C.F.R. 10.16(c)(2), (3), and (5). The regulation identifies some operations that *do* qualify as "incidental to assembly," such as cleaning; rust, grease, and paint removal; application of preservative coatings and trimming and folding. 19 C.F.R. 10.16(b). These examples are consistent with the understanding of the statute expressed in its legislative history. See H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965).

concomitant" of the assembly process (*Webster's Third New International Dictionary* 1142 (1976)).

By "balancing" the factors described by the Federal Circuit in the *Mast* case, however, the courts below concluded that the statutory standard should be deemed satisfied simply because, as a practical or "economic" matter, it is efficient for "permapressing" to be done "concurrent with assembly" (App., *infra*, 21a). The *ad hoc* adjudicative approach required by application of the *Mast* factors in customs cases is inevitably time-consuming, expensive and prone to inconsistency. Even if the result obtained through the "balancing" of various subjective factors could yield *a* reasonable application of the statute, it is plainly not the *only* reasonable method of implementing the statutory phrase "incidental to the assembly process."

Congress authorized the Treasury, not the courts, to "issue rules and regulations governing the admission of articles under the provisions of the tariff schedule." General Headnote 11 of TSUS, 19 U.S.C. 1202. The regulations adopted by the agency should have been sustained because they are not "unreasonable" and are not "plainly inconsistent with the revenue statutes." *Commissioner* v. *Portland Cement Co.*, 450 U.S. 156, 169 (1981), quoting *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948).

c. The Court of International Trade erred in concluding (App., *infra*, 23a) that the agency's regulation conflicts with the plain language of the statute. The court based that conclusion on its assumption that the regulation precludes every operation that "*imparts new characteristics*" to an article from being regarded as "incidental to assembly" (*ibid.*). That as-

sumption is based upon a misreading of the plain text of the regulation.

The regulation does not state, as the lower court suggested, that *any* process that "*imparts new characteristics*" to goods cannot be regarded as "incidental to assembly." Instead, the regulation defines "[o]perations not incidental" to the assembly process to include (19 C.F.R. 10.16(c)):

> [a]ny significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process.

In general, the regulation thus excludes from the duty exception only those operations that are "not related to the assembly process" or whose "primary purpose" is "improvement of a component" rather than assembly. Neither of the courts below has suggested that there is any flaw in that general regulatory definition of the statutory concept of "incidental to assembly." Indeed, the language criticized by the courts below—concerning operations that "impart new characteristics" to goods—does not even appear in that general definition.

The language criticized by the courts below appears only in the subsection of the regulation that addresses operations that involve the "[c]hemical treatment of components or assembled articles [of clothing] to impart new characteristics, *such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles*" (19 C.F.R. 10.16(c)(4)) (emphasis added). That language specifies only that such "[c]hemical treatment" of clothing as "permapressing" does not qualify as "incidental" to assembly under the statute. *Ibid.* This portion of the regulation is justified by the fact that chemical processes such as "permapressing" (i) are not necessary or related to assembly, (ii) impart new characteristics to clothing and (iii) entail substantial time and capital requirements (App., *infra*, 21a). The narrow, focussed administrative determination that such operations are not "incidental to the assembly process" is neither "unreasonable" nor "plainly inconsistent" with the statute and therefore "must be sustained" (*Commissioner* v. *Portland Cement Co.*, 450 U.S. at 169).

3. The Court of International Trade has exclusive jurisdiction over tariff protest cases, and the Federal Circuit has exclusive jurisdiction over appeals from the Court of International Trade. The decision in this case is thus binding throughout the Nation. In similar circumstances, this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal and administrative importance. See, *e.g.*, *United States* v. *Hill*, 506 U.S. 546, 549 (1993); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); *United States* v. *American Bar Endowment*, 477 U.S. 105, 109 (1986). Such review is appropriate in this case.

a. The question presented in this case has substantial legal and practical importance. In the past, formal Treasury interpretations of tariff legislation have been accorded substantial deference. See *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978); *United States* v. *89 Bottles of "Eau de Joy"*, 797 F.2d 767, 771 (9th Cir. 1986). This was true in the Federal Circuit as well. See *Guess? Inc.* v. *United States*, 944 F.2d 855, 858 (Fed. Cir. 1991); *Generra Sportswear Co.* v. *United States*, 905 F.2d 377, 379 (Fed Cir. 1990);

Mitsui Foods, Inc. v. *United States*, 867 F.2d 1401, 1403 (Fed. Cir. 1989); *DAL-Tile Corp.* v. *United States*, 829 F. Supp. 394 (Ct. Int'l Trade 1993). That court, however, has now purportedly discovered in the text of a remote procedural statute a radical legislative departure from the longstanding rule of deference to administrative interpretations.

It is only recently that the Federal Circuit has held that, in enacting 28 U.S.C. 2643(b), Congress directed the courts to give no weight to Treasury interpretations of the Tariff Act. That conclusion first appeared as dicta in *Crystal Clear Indus.* v. *United States*, 44 F.3d at 1003*. It has now been adopted and applied in a number of customs cases. See, *e.g.*, *IKO Industries* v. *United States*, 105 F.3d 624, 626 (Fed. Cir. 1997); *Rollerblade, Inc.* v. *United States*, 112 F.3d 481, 483 (Fed. Cir. 1997); *Universal Electronics, Inc.* v. *United States*, 112 F.3d 488, 491-493 (Fed. Cir. 1997); *Better Home Plastics Corp.* v. *United States*, 119 F.3d 969, 971 (Fed. Cir. 1997); *Midwest of Cannon Falls, Inc.* v. *United States*, 122 F.3d 1423, 1426 (Fed. Cir. 1997); *Sharp Microelectronics Technology, Inc.* v. *United States*, 122 F.3d 1446, 1449 (Fed. Cir. 1997); *Anhydrides & Chemicals, Inc.* v. *United States*, 130 F.3d 1481, 1486 (Fed. Cir. 1997). In these decisions, the Federal Circuit has repeatedly relied on the implausible theory that the statutory directive that the Court of International Trade is to "reach the correct result" (28 U.S.C. 2643(b)) trumps the traditional deference owed to agency interpretations. See pages 13-16, *supra*. Because the Federal Circuit rejected the government's request for rehearing en banc in this case, the issue now appears to be beyond correction in that circuit.

Paradoxically, the Federal Circuit continues to accord *Chevron* deference to Treasury interpretations of the Tariff Act in customs *valuation* cases. *Goodman Mfg., L.P.* v. *United States*, 69 F.3d 505, 508 (Fed. Cir. 1995). In *IKO Industries* v. *United States*, 105 F.3d at 626, the Federal Circuit distinguished those cases on the ground that they "did not involve a classification dispute but rather a dispute regarding the proper valuation." This establishes an artificial and untenable distinction between the two "traditional categor[ies] of [customs] litigation" (Re, *supra*, at XXIV). Whatever meaning there is to the statutory directive that the Court of International Trade "reach the correct result" in customs cases (28 U.S.C. 2643(b)), that statute applies equally to *all* types of tariff litigation. Congress did not establish different standards of review for valuation cases than for classification cases, and there is no logical basis to create such a distinction.[9]

If 28 U.S.C. 2643(b) has the meaning adopted by the Federal Circuit in this case, that statute would be the only instance of which we are aware in which Congress has stripped an agency of the deference to which its interpretations are traditionally entitled. See note 4, *supra*. The unique conclusion reached by the Federal Circuit in interpreting this statute has, moreover, been derived from the most modest of statutory texts. See page 14, *supra*. And, in reaching that unique conclusion, the court of appeals failed even to acknowledge or address the "presumption" that Congress intends statutory ambiguities to be

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[9] Classification cases constitute the most common type of tariff dispute, for they comprise approximately 80 percent of the customs cases that reach the courts.

"resolved, first and foremost, by the agency" charged with the duty of administering the statute, "rather than the courts" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 740-741). Review is warranted in this case because of the extraordinary departure of the Federal Circuit from the consistent decisions of this Court.

b. The decision of the court of appeals has substantial practical importance. By denying deference to the Treasury regulations that interpret the detailed classification provisions of the Tariff Act, the Federal Circuit has left both importers and the Customs Service without effective guidance for a wide range of transactions. Because the agency's interpretive regulations have been deprived of any effect, the ultimate application of customs provisions cannot now be determined until completion of a cumbersome, case-by-case inquiry to obtain an *ad hoc* judicial "balancing [of] the relevant factors" (App., *infra*, 21a). Moreover, as the Federal Circuit has pointed out, the list of the "relevant factors" to be applied in such judicial proceedings may vary from situation to situation. *General Motors Co.* v. *United States*, 976 F.2d at 720. Since the "balancing" of such "relevant factors" is an inherently subjective inquiry, it is obvious that different triers of fact could reach different results on similar sets of facts. For example, two permapressing operations, even if descriptively similar, could yield different tariff results depending upon whether or not "economics and practicality dictate" that "the curing of the fabric would logically occur * * * concurrent with assembly" (App., *infra*, 21a). The result of the *ad hoc* approach adopted in this case—and of the court's refusal to give any weight to the agency's interpretive regulations—is expensive customs litigation and unpredictable outcomes.

The appropriation by the Federal Circuit of the statutory authority of the Treasury Department to issue binding regulations under the Tariff Act is inherently a matter of substantial public importance. The decision below disables the Customs Service from providing effective, advance guidance to the public concerning the application of the customs laws to discrete transactions. As a result, manufacturers will be unable, at the time they plan their transactions, to predict with reliability their tax obligations. Review of the decision below is appropriate because of the serious, recurring importance of the questions presented both to the administration of the customs laws and to the commercial activities to which those laws apply.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 97-1002

HAGGAR APPAREL CO., PLAINTIFF-APPELLEE

v.

THE UNITED STATES, DEFENDANT-APPELLANT

Decided: October 22, 1997

Before: RICH, NEWMAN, and CLEVENGER, Circuit Judges.

RICH, Circuit Judge.

This appeal in a so-called "American-goods-returned" case is from the decision by the United States Court of International Trade of 25 July 1996 in case number 93-06-00343 ordering the United States to grant a duty allowance for the goods in question. We affirm.

BACKGROUND

The merchandise at issue in this case consists of men's and women's permanent-press, wrinkle-free trousers that are assembled in Mexico from resin-impregnated fabric components made in the U.S. Plaintiff-appellee, Haggar Apparel Co. ("Haggar"), sells a line of such garments under the mark PRESTIGE. There are three types of fabric used to make

the PRESSTIGE garments: pre-cured fabrics in which the impregnating resin is cured before assembly into garments; synthetic fabrics which require pressing, but not curing; and post-cured fabrics that require curing after assembly into garments. While only those garments made with the third type of fabric—the post-cured fabric—are at issue in this case, all of the Haggar PRESSTIGE products are assembled, tagged, and packaged in Mexico for distribution in the U.S. Indeed, except for the brief detour required to cure the post-cured fabric, all of the PRESSTIGE products are processed in the same plants and undergo the same assembly, tagging, and other processing steps.

OPINION

The issue in this case is whether the oven-baking process used to cure Haggar's post-cure fabric is an operation that is "incidental to assembly" under the tariff laws. The issue arises because the tariff provisions provide a partial duty allowance for certain U.S.-made components that are assembled outside the U.S. for return to the U.S. so long as the components are not advanced in value or improved in condition "except [by the actual assembly itself or] by operations [which are] incidental to the assembly process." Item 807.00, Tariff Schedules of the United States (1988) (for pre-1989 entries) and subheading 9802.00.80, Harmonized Tariff Schedule of the United States (1989).

The Court of International Trade, in a thorough opinion by Chief Judge DiCarlo, correctly applied the test set forth in the decision of this court's predecessor court in *United States v. Mast Indus., Inc.*, 668 F.2d 501 (C.C.P.A. 1981), to determine whether

ovenbaking is an operation that is incidental to assembly. In so doing, the court began its analysis by properly rejecting as overly restrictive the United States' argument that the term "assembly" means the joinder of two components. Instead, the court properly concluded that certain minor operations are not merely incidental to assembly, but are so integral to the process as to merge with it. The court then diligently applied the factors applied by this court's predecessor in *Mast*, to analyze the curing operation at issue in this case. After balancing the relevant *Mast* factors, the court correctly concluded that the curing operation is "incidental to the assembly process" within the meaning of the statute.

The court next properly rejected the United States' argument that although "incidental to assembly," the curing process may nonetheless fall outside of the statute's tariff shelter if the process caused a prohibited advancement in value. The court looked to the express language of the statute and correctly concluded that the statute does not prohibit advancement in value where the operation in question is incidental to the assembly process.

Finally, the court properly rejected the United States' argument that Customs' regulations interpreting and applying this statute are entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). As we have recently held in several cases, the United States' argument is without merit. *See Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997) (no *Chevron* deference applies to classification decisions); *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491-93 (Fed. Cir. 1997) ("neither

this court nor the Court of International Trade defers to Custom's interpretation of a tariff heading on the basis of special deference pursuant to [*Chevron*]"). Acknowledging the procedural importance of presumptions, the Court of International Trade is nonetheless charged with the duty to "reach the correct decision." *Rollerblade*, 112 F.3d at 484 (quoting 28 U.S.C. § 2643(b)). On appeal, we review the findings of that court—not those of Customs—for clear error; while we decide questions of law *de novo*. *Universal Elecs.*, 112 F.3d at 491.

CONCLUSION

The decision of the Court of International Trade was correct for the reasons stated in its opinion. Therefore, we affirm.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 97-1002
CIT-93-06-00343

HAGGAR APPAREL CO., PLAINTIFF-APPELLEE

v.

THE UNITED STATES, DEFENDANT-APPELLANT

[Entered: Feb. 20, 1998]

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on February 27, 1998.

FOR THE COURT,
JAN HORBALY, CLERK

Dated: February 20, 1998

By /s/ ALEX VAN VEEN /amt
ALEX VAN VEEN
Staff Law Clerk

cc: SAUL DAVIS
EDWARD M. JOFFE
BRUCE G. FORREST

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* Note: Pursuant to Fed. Cir. R. 47.6, this order is *
* not citable as precedent. It is a public record. *
****

APPENDIX C

UNITED STATES
COURT OF INTERNATIONAL TRADE

No. 93-06-00343
Slip Op. 96-110

HAGGAR APPAREL COMPANY, PLAINTIFF

v.

UNITED STATES, DEFENDANT

Decided: July 12, 1996

Before: DICARLO, Chief Judge.

OPINION AND JUDGMENT ORDER

DICARLO, Chief Judge: Plaintiff, Haggar Apparel Company challenges the denial of protests filed pursuant to section 515 of the Tariff Act of 1930, 19 U.S.C. § 1515 (1988). Haggar contends the United States Customs Service erroneously denied a duty allowance for fabric components manufactured in the United States and shipped to Mexico for assembly into men's pants. Jurisdiction is proper under 28 U.S.C. § 1581(a) (1988). The court finds the merchandise in question is entitled to a duty allowance.

BACKGROUND

The imported merchandise consists of men's pants assembled in Mexico from components manufactured in the United States. (Stip. Facts ¶¶ 9, 43.) Haggar markets these pants under the "Presstige" name. The most important performance characteristics of Presstige pants are crease retention and seam and surface flatness; the pants are "wash and wear" garments. (Tr. at 11-12, 40; Stip. Facts ¶¶ 18-19.)

Haggar achieves its performance requirements by using a "pre-cured," "post- cured," or pure synthetic fabric. (Stip. Facts ¶ 18.) Curing involves the application of heat to fabric treated with resin. Under the pre-cured method, resin and heat are both applied at the textile mill; Haggar purchases the fabric, cuts it to shape, assembles the components, and presses the completed garment. (Stip. Facts ¶ 20; Tr. at 12.) Under the post-cured approach, Haggar purchases resin-treated fabric from the mill, cuts, assembles, and presses the garment, and bakes it in a curing oven. *Id.* Both the pre-cured and post-cured methods use fabric of a cotton-synthetic blend, which is typically sixty percent cotton and forty percent polyester. (Stip. Facts ¶ 9; Tr. at 12.) Presstige pants made from a pure synthetic fabric require pressing, but do not require resin treatment or baking. (Tr. at 43.)

All methods for producing Presstige pants involve the same assembly and pressing process. *Id.* at 13. The only difference occurs after pressing. *Id.* In the post-cured method, the pants are loaded on an oven conveyer, baked, and unloaded from the conveyer. Improper pressing of the garment prior to the baking process will result in the product being sold as a "second," as proper pressing is essential to crease

retention and surface flatness. (Stip. Facts ¶ 41.) In addition, a crease defect cannot be reversed after oven-baking. *Id.*

The garments at issue are Model 245 Presstige pants imported by Haggar in 1988 and 1989. (Stip. Facts ¶ 36; Haggar's Customs Protest at 3-4.) These pants were made from fabric style 2010, which is a post-cured fabric comprised of sixty percent combed cotton and forty percent fortrel polyester. (Stip. Facts ¶ 39.) The fabric and other components, such as buttons, thread, zippers, and trim items, were manufactured in the United States. *Id.* ¶¶ 47-50. Haggar cut the resin-treated fabric to shape, and exported the fabric and remaining components to Mexico, where they were assembled into pants by Haggar's wholly owned subsidiary, Haggarmex. *Id.* ¶¶ 9, 43-52. Following assembly, pressing, and baking, Haggar attached hangtags and tickets to the pants and packaged and shipped them to the United States. (*Id.* ¶ 52; Tr. at 153-154.)

Upon importation, Haggar sought a duty allowance for pre-1989 entries under item 807.00 of the Tariff Schedule of the United States [hereinafter "TSUS"], and for the remaining entries under subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States [hereinafter "HTSUS"]. Item 807.00, Subpart B, Part I, Schedule 8, TSUS (1987); Subheading 9802.00.80, Chapter 98, Section XXII, HTSUS (1987) (implemented into law on Jan. 1, 1989, pursuant to 19 U.S.C. § 3004 (1988)). Customs denied a duty allowance for the post-cured, cut-to-shape fabric components, but granted the duty allowance for all other components produced in the United States. For the post-cured fabric Customs assessed duties at the rate

of 16.5 percent *ad valorem* under TSUS item 381.62.40, and 17.7 percent ad valorem under HTSUS subheading 6203.42.40. (Stip. Facts ¶ 11.)

DISCUSSION

Customs is entitled to a presumption of correctness as to its factual determinations. *See* 28 U.S.C. § 2639(a)(1) (1988) (presumption); *see also Goodman Mfg., Inc. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995) (limiting presumption to factual determinations). Plaintiff bears the burden of proving that Customs' determination is incorrect. 28 U.S.C. § 2639(a)(1).

Item 807.00(c) of the TSUS affords domestic goods exported for purposes of assembly a partial duty allowance upon re-entry into the United States. To qualify under item 807.00(c), fabricated components of the United States assembled abroad must not be advanced in value abroad outside of assembly and operations incidental to the assembly process. Item 807.00(c), TSUS. Item 807.00 provides:

> 807.00 Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting.

Item 807.00, TSUS. Pursuant to item 807.00, Customs assesses a duty upon eligible merchandise based "upon the full value of the imported article, less the cost or value of such products of the United States." *Id.* The HTSUS provides an identical exemption under Subheading 9802.00.80.

The parties do not challenge that the imported merchandise was advanced in value or improved in condition abroad. Further, they agree that the articles were exported in condition ready for assembly without further fabrication and that the articles have not lost their physical identity. (Stip. Facts ¶¶ 44-45.) Therefore in determining whether the components qualify for an item 807.00 trade allowance, the dispositive issue is whether ovenbaking is an operation incidental to assembly. To answer this question, the court turns to the Federal Circuit's decision in *United States v. Mast Industries, Inc.*, 668 F.2d 501 (C.C.P.A. 1981).

I. The Mast Factors

To determine whether button-holing and pocket-slitting operations were incidental to assembly of women's pants, the court in *United States v. Mast* examined the following factors:

> (1) Whether the cost of the operation relative to the cost of the affected component and the time required by the operation relative to the time required for assembly of the whole article were such that the operation may be considered "minor."
>
> (2) Whether the operations in question were necessary to the assembly process....

(3) Whether the operations were so related to assembly that they were logically performed during assembly.

Mast, 668 F.2d at 506. The *Mast* court also indicated a fourth consideration: "whether economic or other practical considerations dictate that the operations be performed concurrently with assembly." *Id.* at n. 7. These factors are not exhaustive, and all factors may not be relevant in each case. *General Motors Corp. v. United States*, 976 F.2d 716, 719-20 (Fed. Cir. 1992). Nonetheless, the most basic question — whether such operations are of a minor nature incidental to the assembly process — remains the focus of the court's inquiry.

(A) Cost Comparisons

The first prong of the *Mast* comparisons examines whether the challenged operation constitutes a significant proportion of the total assembly process. To make this determination, the court must first define the scope of the challenged operation, because in making the cost determination, the court must weigh the expense and time costs of the challenged operation against the cost of assembly. According to plaintiff, the court should compare only ovenbaking against total assembly costs. (Haggar's Post Trial Br. at 1-2.)

Defendant argues the court must compare all non-assembly costs against only pure assembly expenses. (Def.'s Post Trial Br. at 2-3.) To accomplish this task, defendant first contends that operations included on the assembly side of the *Mast* comparisons are solely those operations which encompass the joinder of two solids. *Id.* at 16 & n.10. Defendant argues

that, at a minimum, the court must exclude *all* non-joinder operations, including minor chopping and trimming operations, from the assembly side of the *Mast* comparisons. *Id.* at 16-17.

Second, defendant contends the court must combine *all* non-joinder operations which were excluded from the assembly side of the *Mast* comparisons for comparison against pure assembly costs in order to ascertain whether the challenged operations were more than minor improvements, and therefore, not incidental to assembly. *Id.* According to defendant, failing to combine all non-joinder costs for comparison against pure assembly costs would result in a piecemeal analysis that would undermine "item 807.00 by allowing major and significant operations to be broken down to [a] point where each step could be called minor." *Id.* at 17 (quoting *General Motors*, 976 F.2d at 720). Defendant contends this court in *Surgikos, Inc. v. United States*, 12 Ct. Int'l Trade 242, 245 (1988) similarly combined all non-assembly operations for comparison against pure assembly operations in determining whether the challenged operations were minor and, therefore, incidental to assembly. *Id.* at 17-18.

The court disagrees with defendant's readings of *General Motors* and *Surgikos*. Neither decision demands that *all* non-joinder operations must be combined for comparison against only pure assembly functions. The Federal Circuit in *General Motors* disagreed with the lower court's "piecemeal analysis" because the lower court improperly sought to separate the various components of a single process— coating operations during automobile assembly— that should have been considered together. 976 F.2d at 720.

The Federal Circuit determined that isolating the various components of the coating operation for an item 807.00 allowance would have allowed importers to argue that each component of the challenged operation was minor, even though the operation as a whole was a significant process, and therefore not incidental to assembly. *Id. General Motors*, however, did not mandate combining *all* "non-joinder" functions with the coating operations when comparing expense and time costs against the cost of the affected components, and the duration of assembly, as defendant now urges. If this were the case, the Federal Circuit would have also grouped the other non-joinder processes including water testing, detail work, inspections, wheel alignment, and final drive tests with the coating operations in its *Mast* calculations. *See id.* at 717-18 (listing non-assembly operations).

Surgikos also fails to support defendant's position. *Surgikos* concerned the assembly of surgical sheets assembled in Mexico. Although the court in *Surgikos* did weigh the only two nonassembly operations — fenestration (creating a rectangular opening in the sheet) and finish folding (functional folding to maintain antiseptic conditions) — against the pure joinder operations, Customs had challenged *both* fenestration and finish folding as nonincidental to assembly; the joinder of the surgical sheets was the only remaining operation. 12 Ct. Int'l Trade at 243-44. Customs, by challenging *all* non-assembly operations as not being incidental to assembly, necessarily mandated that the court compare all non-assembly operations against pure assembly. The issue of whether all nonassembly operations must be weighed against pure assembly, however, was not before the court. The court therefore does not read *Surgikos* as broadly as defendant urges.

The court finds that the minor chopping, handling and trimming operations are not merely incidental to assembly, but are so integral to the process as to merge with it. (*See* Court's Findings, Tr. at 511) (noting that such processes are related to assembly and may also be part of assembly); *see also General Instrument Corp. v. United States*, 499 F.2d 1318, 1319-21 (C.C.P.A. 1974) (finding spooling, shaping & machine pressing, cement coating, cutting, stripping, and weaving of magnet and lead wire exported from the United States to Taiwan where wire was wound into coils and cable harnesses as constituting assembly for purposes of item 807.00). These minor operations include placing a notch into the zipper to facilitate the next assembly step, minor trimming of loose threads, simultaneous sewing and cutting of the fly lining, the cutting apart of bands (fabric belt encircling waist) & separation of excessive band lining, the sorting and placing of belt loop components together on a crimping machine to bond the components together, as well as certain supply and handling operations and various manipulations of the fabric so as to make further assembly more efficient. (Tr. at 128-40.) The court, therefore, rejects defendant's interpretation of assembly as purely the joinder of two components as overly restrictive.

The question remains whether pressing is part of the challenged operation compared against assembly. Haggar contends that the challenged operation consists solely of ovenbaking. (Haggar's Post Trial Br. at 1-2; Haggar's Post Trial Reply Br. at 9.) According to Haggar, pressing could not be part of the chal-

lenged operation because Customs has considered pressing by itself to be minor and incidental to assembly under item 807.00. *Id.* at 11. However, pressing is necessary to further the curing process. (*See* Stip. Facts ¶ 42) ("the post-curing process used on the [pants in issue] was achieved by pressing and oven-baking.") Although in a strict sense, pressing is not part of curing, as the actual heat-induced transformation of the fabric is performed during oven-baking, pressing is integrally related to Haggar's purpose in conducting the curing process, namely to develop crease retention and greater surface and seam flatness in its garments. (Stip. Facts ¶ 19; Tr. at 44.)

This decision is consistent with the decision of the Federal Circuit in *General Motors*. In *General Motors*, the Federal Circuit rejected the lower court's delineation of the challenged painting operation as too narrow, finding "that all coating operations performed upon the disputed components . . . must be considered in conjunction with topcoat painting operations to determine if coating operations, collectively, are minor incidents to assembly." 976 F.2d at 720.

The pressing operation, like the coating operations in *General Motors*, did not interfere with item 807.00's prescriptions when performed in isolation. However, when performed prior to ovenbaking, pressing does more than simply impart a temporary smoothness to the fabric. It begins the curing process which, once started, imparts permanent new characteristics to the pants. Thus, the entire curing operation in this case is analogous to the entire finish painting operation in *General Motors*; the court must

consider ovenbaking in conjunction with pressing when applying the *Mast* test.

Application of the first *Mast* factor involves comparing (1) the cost of the curing operation relative to the cost of the post-cured fabric component, including, pursuant to *General Motors*, the comparison of Haggar's investment in the curing operation versus its investment in the assembly process; and (2) the time required for curing, relative to the time required for assembly. *General Motors*, 976 F.2d at 719-21.

(i) Cost Comparisons of Curing Relative to the Cost of the Affected Components, and to the Cost of the Assembly Process

Dividing the cost of pressing and baking ($0.0529) by the cost of the fabric components ($3.08) indicates the curing operation constitutes 1.72 percent of the component cost.[1] (Joint Stip. at 2-3.) Further, comparing the cost of curing (again pressing and ovenbaking, $0.0529) against the total operation cost ($0.500) constitutes 10.6 percent. *Id.* The court does not find either figure significant. *See Mast*, 668 F.2d at 506 (finding 15% minor [$0.003 of $0.020 in percentage terms]).

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[1] The parties stipulated that overhead costs of "factory supplies, pressing expense, H & O repair, H & O repair parts, porters, office security guard, boiler maintenance, cook, legal, doctor, severance pay, unemployment, insurance (unemployment and insurance are two separate parts), dues and subscription, telephone, employee benefits, other professional fees, office supplies, janitor supplies, travel, auto expense[s], advertising and building maintenance cannot be allocated to the pants at issue," or to a division of assembly versus nonassembly costs. (Parties' Stip., Tr. at 535.) The court therefore makes *Mast* cost comparisons exclusive of overhead.

(ii) Capital Investment Comparisons

The court in *General Motors* also found a capital investment determination relevant to the cost analysis. 976 F.2d at 721. Defendant argues that proper analysis under this factor requires the use of replacement costs, as supplied by the parties in their cost stipulations. (Def.'s Post Trial Br. at 21, 39.) According to defendant, if the court instead were to use depreciated costs, the qualification for a duty allowance would vary by the year the merchandise in question would be imported, or by the age of the equipment used on the imported merchandise. *Id.* at 21. Thus similarly-positioned importers might receive disparate treatment for the same operation.

Plaintiff argues depreciation costs are proper. (Haggar's Post Trial Reply Br. at 19, 20.) Plaintiff argues Customs' practice has been to permit depreciation of the machinery, as in accordance with generally accepted accounting procedures. (Haggar's Post Trial Br. at 10.) According to plaintiff, the investment cost of the ovens was zero, as the ovens were 25 years old and fully depreciated when they were transferred to Mexico. *Id.* Permitting depreciation, the only remaining equipment for comparison would be the pressing equipment ($430,000), which would constitute 50 percent of assembly capital costs ($857,724). (Joint Stip. at 4) (total capital costs minus pressing & ovenbaking). If the court did not permit the depreciation of the oven to zero, the capital investment of the curing equipment would be $522,808, or 61 percent of the assembly capital costs. *Id.* The court cannot consider either of these figures as minor and finds that these factors weigh against granting a duty allowance under item 807.00.

(iii) Time Comparisons

The Federal Circuit in *General Motors* found "where operations . . . involve significantly automated or non-labor processes (*such as baking*), this factor provides little guidance on whether operations are of a 'minor nature.'" 976 F.2d at 720 (emphasis added). Ovenbaking is an automatic process which accounts for nearly one-third of the total operation time. (Revised Joint Stip. at 1) (dividing 15 minutes ovenbaking time by 42 minutes for total operation). The court, pursuant to *General Motors*, does not address this test here.

(B) Necessity and Logical Relatedness to Assembly

Mast factors 2 and 3 examine respectively whether the challenged operations were so related to assembly that they were necessary to the assembly process, and whether the challenged operations were so related to assembly as to be performed during assembly. *Mast*, 668 F.2d at 506.

The parties have stipulated that "[t]he effect of ovenbaking is to create crease retention and greater surface and seam flatness in the garment, and prevent wrinkling." (Stip. Facts ¶ 55.) These features are unrelated to assembly. The parties in fact have agreed that assembly occurs without the initiation of the curing process — pressing — so it follows the entire curing operation would be similarly unnecessary. (Stip. Facts ¶ 38.) The court finds that ovenbaking and pressing are not necessary, nor related to assembly. (Court's Findings, Tr. at 455, 503, 505-506.)

(C) Economic & Other Practical Considerations

The fourth *Mast* factor examines whether economic and practical considerations dictate that the challenged operations be performed concurrently with assembly. 668 F.2d at 506 n. 7.

Defendant argues that plaintiff cannot present any considerations requiring that curing be conducted concurrently with assembly, because curing does not begin until after assembly is completed. (Def.'s Post Trial Br. at 41-42.) According to defendant, *Mast* and its progeny demonstrate that "concurrently" with assembly only extends to actual joinder. *Id.* at 16 n. 10, 41-42.

The court does not agree with defendant's narrow interpretation of "concurrently." This restrictive interpretation would, in effect, require a showing that ovenbaking must be done during assembly because it is necessary to further assembly. However, this inquiry is already accomplished by the necessity requirement in *Mast*. The legislative history of item 807.00 demonstrates clear Congressional intent to permit duty-free treatment of a component manufactured in the United States if subjected to an operation "of a minor nature incidental to the assembly process, whether done before, during or after assembly." *Tariff Schedules Technical Amendments Act of 1965*, H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965).

The parties agree that, if the pants were packed and shipped to the United States immediately after assembly, but before curing, Haggar would incur additional costs for repacking and reshipping to the distribution centers. (Parties' Stip., Tr. at 545.) Moreover, an additional work shift would have to be added

to complete the ovenbaking and pressing at higher labor costs. *Id.* at 547. Mr. Ernie Ramirez, International Accounting Manager for Haggar, also testified that "throughput" time (total time from when the garment is cut to when it is received by the customer) would be increased by 3-4 days, and separating ovenbaking from assembly would result in higher transportation costs, increased production times, the need for additional facility investment, higher handling costs, and additional overhead expenses. (Tr. at 347, 399-402.) Finally, Mr. Frank Bracken, President of Haggar Apparel Co., testified that post-curing immediately after assembly was necessary because there was a risk with post-cured fabric that permanent creases and wrinkles would occur during shipping, and render the product "useless." (Tr. at 39, 49-50.) Although the curing operation does not preclude assembly from occurring, the court finds the curing of the fabric would logically occur at this time to minimize damages and economic costs. The court holds that economics and practicality dictate that Haggar cure its merchandise concurrent with assembly.

The court finds the costs of the curing operation are insignificant as a percentage of the fabricated components and of the entire operation. Moreover, strong economic and practical considerations dictate that curing be performed concurrently with assembly. After balancing the relevant factors, the court finds that the curing operation is "incidental to the assembly process" within the meaning of item 807.00, TSUS, and subheading 9802.00.80, HTSUS.

II. Advancement in Value

Defendant argues that, even if the *Mast* analysis results in a finding that the operation is minor, additional inquiry is necessary to determine whether the imported article has undergone a prohibitory advancement in value. (Def.'s Post Trial Br. at 23-26.) Therefore, according to defendant, the court should consider the importance to Haggar of the crease retention and the greater surface and seam flatness as an additional factor. *Id.*

Defendant's arguments are meritless. Item 807.00 provides that a duty allowance is permissible so long as the merchandise in dispute has not been advanced in value "except by operations incidental to the assembly process." Item 807.00(c), TSUS. Item 807.00 does not prohibit an advancement in value, therefore, so long as the operation in question is incidental to assembly.

III. 19 C.F.R. Section 10.16

Defendant contends 19 C.F.R. § 10.16 (1988) governs the application of item 807.00. Subsection 10.16(c) provides:

> Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article.

19 C.F.R. § 10.16(c) (1988) (1989 version identical).

The court disagrees. Subsection 10.16(c) conflicts with the plain language of item 807.00. Item 807.00 does not prohibit operations which merely *impart new characteristics* to the article being assembled as the regulation provides, but in fact permits a duty allowance for such improvements to the articles so long as the operation imparting those characteristics was incidental to assembly. Moreover, the Federal Circuit has strongly qualified 19 C.F.R. § 10.16, *see Chrysler Corp. v. United States*, 1996 WL 132263 at *2 (Fed. Cir. 1992) (finding the cost comparisons in *General Motors* "determinative" over 19 C.F.R. § 10.16), or has ignored the regulation altogether, *see Mast*, 668 F.2d at 506 (developing factors); *General Motors*, 976 F.2d at 718 (citing, but not applying regulation); *United States v. Oxford Industries, Inc.*, 668 F.2d 507 (C.C.P.A. 1981) (applying *Mast* factors only). Indeed, defendant has recognized pursuant to the court's questioning that these decisions have cast considerable doubt on the regulation's validity. (Def.'s Suppl. Br. at 1-2.)

Finally, although defendant argues that Customs is entitled to deference pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984), the recent decisions in *Crystal Clear Industries v. United States*, 44 F.3d 1001 (Fed. Cir. 1995), and *Anval Nyby Powder AB v. United States*, Slip. Op. 96-80 (Ct. Int'l Trade My 21, 1996) may have put defendant's assertion into question. *See Crystal Clear*, 44 F.3d at 1003 (declining to apply *Chevron* deference to Customs in routine classification decisions); *see also Anval Nyby Powder AB*, Slip. Op. 96-80 at 12-13 (finding "court's statutory

obligation to find the correct result limits the court's ability to give special *Chevron* deference" to Customs' statutory constructions.) The court finds the Federal Circuit's test in *General Motors* as determinative.

CONCLUSION

The court in applying the *Mast* factors finds that the curing operation performed on Haggar's Model 245 Presstige men's pants, fabric style 2010, was a minor operation incidental to the assembly process under item 807.00, TSUS and subheading 9802.00.80, HTSUS. Customs is ordered to allow a duty allowance for the components in issue.

/s/ DOMINICK L. DICARLO
DOMINICK L. DICARLO
Chief Judge

Dated: July 12, 1996
New York, New York

APPENDIX D

UNITED STATES
COURT OF INTERNATIONAL TRADE

Court No. 93-06-00343

HAGGAR APPAREL COMPANY, PLAINTIFF

v.

UNITED STATES, DEFENDANT

Before: DICARLO, Chief Judge.

AMENDED JUDGMENT ORDER

This action having been submitted for decision, after trial and upon due deliberation, in conformity with the decision rendered, it is hereby

ORDERED that Customs grant a duty allowance under TSUS item 807.00 and HTSUS subheading 9802.00.80, for Haggar's Model 245 men's pants, fabric style 2010; and it is further

ORDERED that the United States Customs Service shall reliquidate the entries accordingly and shall refund all excess duties with interest as provided by law.

ORDERED that the action is dismissed.

/s/ DOMINICK L. DICARLO
DOMINICK L. DICARLO
Chief Judge

Dated: July 25, 1996
New York, New York

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AUG 17 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 97-2044

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

HAGGAR APPAREL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

A BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE

Counsel certifies that the full name of the party represented by our firm is Haggar Clothing Co., formally known as Haggar Apparel Co. The parent company, which has issued shares to the public is Haggar Corp. No other subsidiaries or affiliates have issued shares to the public. There are no nonwholly owned subsidiaries.

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STATEMENT

This case involves a claim for a partial duty exemption on certain imported trousers assembled in Mexico from components produced in the United States. The dispute centers on whether the placing of a pair of pants in a relatively hot oven, which processes 800 garments per hour at a cost of approximately 1 cent per garment, can be considered a process "incidental" to the assembly of those pants within the meaning of item 9802.00.80, Harmonized Tariff Schedules of the United States, (HTSUS). [1] If the process is "incidental," then the value of the U.S. fabric components subjected to that process would not be subject to duty upon importation of the finished product into the United States

This case involves nothing more than a technical dispute over the application of the Tariff laws, a decision best left to the expertise of the specialized courts created by the Congress to resolve these matters. The courts below found for Haggar based upon the application of a standard analysis, "Mast factors,"[2] a balancing test uniformly applied by the courts and the administrative agency for 17 years. Not only does the Customs Service, itself, use this approach, but it endorsed the test in arguments presented to this Court

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[1] Formally item 807.00, Tariff Schedules of the United States, see Pet. Note 1, at 5.

[2] This term is derived from the holding in *United States v. Mast*, 668 F.2d 501, (C.C.P.A., 1981) a case which synthesized the approach to the application of the relevant statutory provisions following their amendment in 1965.

in 1996 when Chrysler asked this court to overturn the application of those factors to its importations. The government responded:

> Petitioner (Chrysler) is wrong to fault the courts below for interpreting the Service's Regulation in light of the correct construction of the statute that the Court of Appeals adopted.

Brief for the United States in Opposition, *Chrysler Corp. v. United States*, No. 95-2058, at 9.

The government seeks reversal of the lower courts' decisions by urging they failed to give "controlling weight" deference to a regulation interpreting the tariff provision. That regulation sought to add an additional condition on the duty allowance (*i.e.*, whether the process improves the condition of the component) which the courts below found to violate the plain language of the statute. Regulations which violate the statute are accorded no deference by the courts. Thus, the question which so consumes the government's petition here, is neither material nor relevant to this case or the decisions below.

This case is substantially different than the cases which raised "deference" issues of concern to the government. This case involves a regulation held *ultra vires*. The government cites no other comments or holdings on the proper level of deference to its regulations with which it is dissatisfied. All the other cases with which it is dissatisfied, deal with the proper standard of review of either *ad hoc* actions taken by Customs officials at various ports of entry around the country, or private letter rulings issued to an individual importer. Those questions should be addressed on their own merits and in a proper case.

In any event, the Government's claim for a "controlling weight" deference standard to its decisions in tariff classification cases is not based upon a fair representation of the rationale used by the lower courts. They did not reject the government's claim based solely upon the directive to "reach the correct decision," and the standard applied does not constitute a departure (radical or otherwise) from the principles of law which govern customs classification cases. (Pet. At 10). The lower courts have applied the standards established for this specialized area of federal jurisprudence – 28 U.S.C. 2638, 2639(a)(1), 2640(a)(1), 2642, and 2643(b). The government's argument ignores a host of considerations including the leading judicial expression of this standard, *Jarvis Clark Co. v. United States*, 733 F.2d 873 (Fed. Cir. 1984) – a case cited at least 326 times without any negative references. Moreover, the suggestion that the Congress would have established specialized trial and appellate courts to review this area of law, but that those courts should defer to the agency under standard administrative law principles defies logic and common sense, as well as the governing statutes.

BACKGROUND

1. The statutory provision at issue finds its roots in court decisions, followed by numerous Customs rulings, which held that American products which were merely attached or assembled with foreign parts could be allowed duty free entry into the United States as American goods returned without having been advanced in value or improved in condition. *See*: Paragraph 1615(a), Tariff Act of 1930; *C.J. Tower & Sons v. United States*, 33 Cust. Ct. 14, (C.D. 1628, 1954): and *Denike v. United States*, 5 Ct. Cust. Appls. 364, (T.D. 34553, 1914).

The adoption of item 807.00, Tariff Schedules of the United States, (TSUS), in 1963 was an effort to codify the substance of this well established practice under a different theory. Tariff Classification Study, Explanatory and Background Materials: Schedule 8 -- Special Classification Provisions, Appendix to the Tariff Schedules, Nov. 15, 1960, pp. 13-16. However, since the substance of the practice was carried over, to qualify under this provision a U.S. component could not be "advanced in value or improved in condition" except by the acts of assembly.

In 1965 the Congress amended this provision to enlarge "the class of activities which may be performed abroad without subjecting the U.S. product to duty." S. Rep. No. 530, 89th Cong.,1st Sess. 34 (1965). Specifically, Congress decided to allow the component to be "advanced in value or improved in condition" by nonassembly processes so long as the nonassembly process was "incidental" and it listed the three examples of cleaning, lubricating and painting. The Congress acknowledged the amendment:

> Would specifically permit the U.S. component to be advanced or improved.... Such operations, if of a minor nature incidental to the assembly process, whether done before, during or after assembly, would be permitted even though they result in an advance in value of the U.S. components in the article assembled abroad. H.R. Rep. No. 342, 89th Cong., 1st Sess. 48-49 (1965).

2. With respect to the regulatory provisions at issue here, they list operations Customs might find both as incidental and nonincidental. *See*: 19 CFR 10.16 (b) and (c). Both subsections (b) and (c) describe the lists of operations as "examples." A characterization also used in the notices which promulgated the regulations. 39 FR 24651, July 5, 1974; and 40 FR 43021, Sept. 18, 1975. Consistent with the

express terms of the regulation, the practice has been to view these examples, both statutory and regulatory, as just that – examples; which still require an analysis of the specific process to determine whether that process was incidental or significant. *See*: *General Motors v. United States*, 976 F.2d 716 (Fed Cir. 1992) (the statutory example of painting); and United States Opposition to Petition for a Writ of Certiorari, *Chrysler Corporation v. United States*, No.95-2058, (regulatory example of preservative painting). Indeed, the government has allowed chemical treatments which impart new characteristics, *see* Customs Ruling HQ 556836, Dec. 2, 1992 (App. at 5a-8a) (adding acid to a battery cell and charging it for 88-96 hours).

3. In relation to this case, the government's statement of the facts is confusing and self-serving. The government neglected to mention that three different models of "Presstige" pants were assembled at the same facility, all of which met the same performance characteristics and were imported. Only the model 245 pants here at issue were denied treatment under statutory provision at issue. T.C. Op., Pet. App. 8a-9a.[3]

Haggar achieves these performance requirements using three different types of fabric -- that is "pre-cured," "post-cured," or purely synthetic. Curing involves the application of heat to fabric treated with resin. Under the "pre-cured" approach heat is applied to the resin-treated fabric at the textile mill in the United States; Haggar purchases the fabric, cuts it to shape, assembles the components, and presses the completed garment. Under the post-cured approach, Haggar purchases resin-treated fabric from the mill, cuts, assembles, and presses the garment, and bakes it in a curing oven. Both the pre-cured and post-cured

[3] For ease of reference, page citations to the opinions below will reference their location in the Appendix to the Petition.

methods use fabric of a cotton-synthetic blend. Presstige pants made from a pure synthetic fabric require pressing, but do not require resin treatment or baking.

The garments at issue – Model 245 pants imported by Haggar in 1988 and 1989 – were made from fabric which was post-cured. The fabric and other components, such as buttons, thread, zippers, and trim items, were manufactured in the United States. Haggar cut the resin-treated fabric to shape, and exported the fabric and remaining components to Mexico, where they were assembled into pants by Haggar's wholly-owned subsidiary. Following assembly, pressing, and baking, Haggar assembled hangtags and tickets to the pants and packaged and shipped them to the United States. The hangtags and tickets must be attached after pressing (and ovenbaking) since heat could potentially damage the paper labels. Trial Transcript (T.T.) 198-199.

The same assembly and pressing process is used for all Presstige pants -- without regard to which methods are used to achieve the performance requirements, *i.e.*, "pre-cured" fabric, synthetic fabric or "post-cured" fabric (*i.e.*, ovenbaked fabric). Each assembly involves over 50 individual labor intensive steps, exclusive of ticketing, labeling and packing. The engineering standards for all three models were the same and the same sewing specification manual is used. [Stip. Facts 56,58] The only difference in the assembly of the ovenbaked product occurs after pressing. In the post-cured method, the pants are loaded on an oven conveyer, baked, and then unloaded from the conveyer.

The stipulated facts indicate that the incremental cost of this process was only $.0106 per garment, approximately .3% of the cost of the components or 2% of the assembler's operating costs. The stipulated facts also reflect that while an individual pair of pants remained in the oven for 12-15 minutes, the oven processed 800 garments per hour –

effectively less than 5 seconds per garment, significantly less than 1% of the time for the assembly operation. Evidence at trial (T.T. 87) also reflected that the same effect could have been achieved by allowing the garment to remain in the pressing unit for an additional 2 to 3 minutes, an approach that would have added approximately 8% to total operation time at an incremental cost of 1.4% of the cost of the components. It was these minor (incidental) differences that led the government to deny the duty benefits to the fabric components at issue here, while granting them for the other two models not subject to the ovenbake process.

4. As with its description of the facts, the government's characterization of the decisions below is both incomplete and misleading. Initially, the government's assertion that the courts below "declined in this case to consider the applicable Customs Service regulation" or "ignored" the regulation, is simply not accurate. Application for an Extension to File a Petition, 2, and Petition, 9.

The trial court examined in general terms whether the degree of advancement in value (improvement) was an appropriate consideration under statutory language. The court found those arguments to be "meritless," concluding the statute "does not prohibit an advancement in value … so long as the operation in question is incidental to assembly." T.C. Op., Pet. App. 22a. The trial court then looked to the language of the opening paragraph of 19 CFR 10.16 and concluded that language "conflicts with the plain language of item 807.00" T.C. Op., Pet. App. 23a. It then looked to the language of 10.16(c)(4) and noted that:

> Item 807.00 does not prohibit operations which merely impart new characteristics to the article being assembled as the regulation provides, but in fact permits a duty allowance for such improvements to

> such articles so long as the operation imparting those characteristics was incidental to assembly.

T.C. Op. Pet. App. 23a. This finding was specifically upheld by the appellate court which concluded:

> The court looked to the express language of the statute and correctly concluded that the statute does not prohibit advancement in value where the operation in question is incidental to the assembly process.

App. Ct. Op. Pet. App. 3a. In short, the courts below did not "ignore" the regulation, rather they held the regulation, and the considerations upon which it is based, contrary to the plain language of the statute.

The government likewise did not provide a complete description of the trial court's findings on the incidental nature of the process at issue which were based upon the considerations outlined in *United States v. Mast Industries, Inc.*, 668 F.2d 501, 506 (C.C.P.A., 1981). The court looked first to the costs, T.C. Op., Pet. App. 17a, and found they represented only 1.7% of the cost of the components and only 10.6% of the cost of the assembly operation, well within the norms historically used by Customs and the courts to find an operation incidental. Even these percentages were only reached by combining the pressing operation (which Customs allowed for other models) with the ovenbake process. Although the court conceded that "in a strict sense, pressing is not part of curing," it did, over Haggar's objections, find the processes sufficiently related to justify this approach. T.C. Op., Pet. App. 16a.

The trial court did not find Pet. 8, that time considerations weighed against the duty allowance. The trial court found that since this was an automated operation the

time was not relevant,[4] citing *General Motors v. United States*, 976 F2d. 716, 720 (Fed. Cir. 1992). This was a rational approach since, while an individual pair of pants remains in the oven for 12-15 minutes, the oven processes 800 garments per hour, effectively 5 seconds per garment. The record also reflects the operation could have been performed manually in only 2-3 minutes. The government has never suggested that Haggar should be disadvantaged for adopting a more efficient approach.

The trial court did not "agree with the agency," Pet. 8, that ovenbaking was unnecessary for assembly -- Haggar never suggested that it was. No post-assembly operation can be considered "necessary" for an act which is already complete, and as the court noted, the legislative history specifically indicates that "incidental" operations can be performed after assembly is complete. T.C. Op., Pet. App. 20a. Thus, and more to the point, the court never suggested this fact weighed against the duty allowance; it is simply an irrelevant consideration for post-assembly operations.

While the trial court did find that capital investment costs weighed against the duty allowance, T.C. Op., Pet. App. 18a, the government neglects to mention that, depending on whether one used depreciated value or replacement cost, either 82% or 100% of that capital investment related to pressing equipment used equally on the other models of pants for which the duty allowance was granted. This, in light of the question on the propriety of combining the pressing and curing operations in the first instance, led the court to accord this factor very little weight.

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[4] The Customs Service applies this same approach administratively. *See* H.Q. 556836, App. 5a-8a. Finding an 88-96 hour operation incidental.

The trial court also found that strong economic and practical considerations dictated that the ovenbake operation occur at the site of assembly. That finding, coupled with the insignificant cost of the operation, and the absence of any strong factors to the contrary, led the court to find the process was "incidental." T.C. Op., Pet. App. 21a.

Finally, after concluding both that the process at issue squarely fell within the parameters of the test long applied by both the courts and the Customs Service, and that the particular regulation at issue was contrary to the plain meaning of the statute, the courts below addressed the question of deference. The discussion by the trial court reached no conclusion and it is clear that neither court viewed this discussion as determinative for its holding. Deference is never accorded a position contrary to the express language of a statute. Thus, the language of these decisions which has consumed almost the entirety of the government's attention in its submissions to this Court is merely *dicta*.

REASONS FOR DENYING THE PETITION

The order of the issues presented, and the entire thrust of the government's petition, places the "cart before the horse." The degree of deference to be accorded decisions or regulations of the Customs Service is not relevant when that regulation and/or its application is contrary to the plain meaning of the statute. "(T)hat is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). The substantive findings of the courts below are not extraordinary, but are consistent with the statute and the approach long followed by the courts and the agency. While the petition chides the trial court for

interpreting the application of the regulation on the basis of *United States v. Mast Industries*, 668 F.2d 1653 (Fed. Cir. 1981), and *General Motors, Inc. v. United States*, 976 F.2d 716 (Fed. Cir. 1992),[5] Pet. 7-8 – just two years ago the government told this Court that the *Mast* analysis applied by the Federal Circuit in *General Motors* constituted the "correct construction of the statute" Brief for the United States in Opposition, *Chrysler Corp. v. United States*, No. 95-2058., at 9. Thus, the first question to be addressed is whether the government's change of heart on the correct construction of the statute is justified.

I. THIS CASE INVOLVES ONLY A TECHNICAL DISPUTE OVER THE PROPER APPLICATION OF THE TARIFF LAWS

Item 9802.00.80, HTSUS, sets forth three criteria for its applicability. First, the exported component must be ready for assembly "without further fabrication." Thus, after export to the foreign country, if an operation is performed on that component that has the effect of further fabricating the component to make it ready for assembly, the condition is breached. The focus of this condition is not on whether the process was minor or significant, but rather the focus is on the effect of that process on the component. *See: Samonsite Corporation v. United States*, 889 F.2d 1074 (Fed. Cir. 1989).

The second criteria is that the component cannot have lost its physical identity by change in form, shape, or otherwise. Again, the focus is not on the process, but rather on the effect of the process on the component. *E. Dillingham, Inc. v. United States*, 470 F.2d 629, 635 (C.C.P.A., 1972).

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[5] This decision specifically applied the *Mast* factors, *id.* 719-21.

The third criteria, at issue here, deals with improvements to the components by nonassembly operations. As noted above, when item 807.00, TSUS (predecessor provision for 9802.00.80, HTSUS) was initially enacted in 1963, if a component was "advanced in value or improved in condition" by a non-assembly operation the criteria was breached. In 1965 the Congress decided to "enlarge the class of activities which may be performed," S. Rep. 530, 89th Cong.1st Sess. 34 (1965), by allowing nonassembly operations to advance or improve the component, so long as the operation which created that improvement was "incidental" to the assembly process. The statutory language is plain that the component can be advanced or improved. A reading that is directly confirmed by the legislative history. *Supra* at 4. It places no limit on the degree of that improvement, so long as the process which creates that improvement is incidental to the assembly process. Here, then, the focus is not on the component, but rather on the process: Is the process "incidental"?

The government's attempts to make the degree of improvement a factor were rejected more than 20 years ago in *Rudolph Miles v. United States*, 567 F.2d 979, (C.C.P.A. 1978). Contrasting the statute as amended in 1965 with prior provisions the court concluded:

> Item 807.00 logically assumes that there has been an advancement or improvement, but limits the extent of the advancement in value or improvement in condition to that which is brought about solely by the act of assembly or operations incidental thereto. Hence, appellant here does not have the burden of showing that there was no advance in value of the (assembled components).

Id. 983. Three years later, the government attempted to rephrase its argument, objecting that the "operations created features in the garments which had a utility independent from the assembly process." *Mast*, 668 F.2d at 506. The court examined the statute and its legislative history and found no support for such a position concluding the intent "was not to preclude operations that provided an 'independent utility' or that are not essential to the assembly process," rather the pertinent question was "to ascertain whether an operation of a 'minor nature' is incidental to the assembly process." *Id.*. The court reached a similar conclusion in *United States v. Oxford Industries, Inc.*, 668 F.2d 507, 511 (C.C.P.A. 1981), noting "neither 807.00, TSUS, nor its legislative history suggest such a test...."

By seeking to put a limit on the degree of permissible improvement, or by indicating that there are certain types of improvement which are prohibited, the government is seeking to impose a condition on the duty allowance that was not imposed by the Congress. This they may not do. This question was squarely decided by this Court over 100 years ago in *Morrill v. Jones*, 106 U.S. 466 (1882). The Congress had provided for duty free entry of animals imported for breeding purposes "upon proof thereof satisfactory to the Secretary of Treasury, and under such regulations as he may prescribe." The implementing regulations sought to limit this treatment to animals "of superior stock, adapted to improving the breed in the United States," *i.e.*, there were certain types of animals the government sought to exclude. The response of this Court was short, succinct, and very clear:

> The Secretary of the Treasury cannot by his regulation alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by

> the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe... That is not the office of a Treasury regulation.

Id. at 467. Just as the government could not make the potential degree of improvement to the breed a factor in 1882, it cannot today make the degree of improvement a factor as to whether a process was incidental to assembly.

It is important to note that the government's arguments here, that the regulation can be applied consistent with the plain meaning of the statute (Pet. 19-20), represent a shift in its litigation strategy. Four months after the government filed its sur-reply to Haggar's reply to the government's post trial brief, the trial court asked both parties to comment on the potential application of the regulation. The government responded: "We did not brief the regulatory issue, even though we feel the regulation is valid, mandatory and consistent with statute. This was a judgmental decision to avoid diminishing the consideration of the *Mast* arguments...." While the letter proceeds to argue in general terms for "controlling weight" deference, the sole justification for consistency with the statute was a footnote which indicated:

> Processes in issue may preclude 9802 treatment if they advance the components in value or improve them in condition. This means that even if there is no or minor advancement in value, if there is significant improvement in condition that is not incidental to assembly, the components cannot be accorded 9802 treatment.

Department of Justice, Letter to Judge DiCarlo, January 26, 1996, at 2. This position is simply untenable under *Morrill*.

In its instant petition the government ignores that the condition it wishes to impose is not one the Congress thought necessary to prescribe and advances several arguments not raised previously in an attempt to make its position appear more palatable. Pet. 20-21. The government first tries to draw a distinction between "improvement of a component" and "to impart new characteristics" to a component. Despite the attempts at word games, whether it is phrased as impart "new characteristics," "independent utility," "improvement of a component" or "advancement in value" – the issue remains the same. For example, painting, a statutorily permissible example, is obviously intended to improve a component and to impart the new characteristic of either rust prevention or a decorative appearance. The statute was amended to allow a component to be advanced or improved and places no limit on either the type or degree of that improvement. It is disingenuous for the government to suggest that the courts have failed to find a "flaw" in the attempt to make this an issue. Pet. at 20. As noted above, the courts have consistently, and in this litigation specifically, found that attempt to be contrary to the plain language of the statute.

The government then seeks to rely on the concept that the operations at issue are "not necessary or related to assembly." Again, this is not the statutory test. Congress could have used the phrase "by operations necessary or related to assembly." It did not. "Incidental" is a much broader term that was designed to "enlarge" the scope of permitted activities. "It is difficult to visualize a situation where the sole purpose of painting would be to facilitate assembly, or even where painting would be essential to the assembly process." *Mast*, 668 F.2d at 505. Moreover, the

ovenbake process needs to be accomplished prior to the attachment of the hang-tags and tickets, and the trial court found, as a matter of fact, that strong economic and practical considerations dictated this process be done at the site of assembly prior to shipment to the customer. Thus, it is related to the assembly process of the completed good to be shipped to the customer.

The government also seeks to rely on the reference to "chemical treatment." Yet as the government, itself, described the facts to the Court of Appeals:

> Pre-cut fabric components were shipped to Mexico from the United States, after they had been chemically treated in the United States. In Mexico, the components were assembled into pants. After completion into pants, they were pressed and subjected to an ovenbaking process which gave the pants a permanent press feature.

Brief for Appellant, at 2. The components simply were not "chemically treated" in Mexico. Even if the government were to now argue the opposite, that argument does not alter the extent of the operation at issue. The government can no more arbitrarily exclude a minor process it does not like, then it can arbitrarily seek to exclude certain breeding stock it does not like. *See Morrill v. Jones*, 106 U.S. 466 (1882).

It is instructive that the government ignores the opening phrase of the regulation at issue, "any significant process." This phrase is critical since it focuses attention on the process and not its effect. In prior litigation, and administrative rulings, the courts and the government have recognized that this consideration is crucial to application of the examples in a manner consistent with the language of the statute. The *General Motors* case dealt with the painting of components. Plaintiff was of the view this operation was

permissible since painting was listed as an allowable operation by the statute. The government disagreed arguing that the process was significant (primarily based upon its cost). The Court of Appeals agreed describing the reference to painting in the statute as an "exemplar" and that the process needed to be viewed in "an objective way to determine if particular operations are minor and incidental to assembly." *General Motors*, 720 F.2d 719-720. It is incredible for the government to suggest, as it has here, that the examples in its regulations should not be subject to the same analysis it applies to the examples in the statute. The government should not be permitted to argue that "no means no, but yes means maybe."

In fact, in other cases, the government has argued that its regulatory examples should be subject to this same analysis. In *Chrysler*, the plaintiff argued that its painting operation was primarily preservative and therefore should be covered by 19 CFR 10.16(b). The government argued to this Court that the examples in its regulations were just that -- examples, and that to be consistent with the statute one needed to examine the operation itself to determine if it was significant. Brief in Opposition, *Chrysler Corporation v. United States*, No. 95-2058, at 9.[6] It is beyond dispute that the Customs Regulations must be read in light of, and applied consistent with, the plain meaning of the statute.

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[6] The agency has applied the same analysis. *See, e.g.*, H.Q. 556362, App. at 9a-13a, which dealt with a painting operation described as primarily preservative, although it utilized a variety of colors to meet customer specifications. Customs still looked to the significance of the operation and found it minor in order to grant the duty allowable. It should be noted that the costs of operation ($.086 paint plus $.01302 labor) was 16.5% of the cost of the components ($.485 and .115). In the instant case the cost of the operation at issue is less than 2% of the cost of the components.

The only factor which even arguably weighs against Haggar is the capital investment amount, which is composed entirely, or almost entirely, of the pressing equipment used equally on pants for which the duty allowance has always been allowed. It is obvious that pressing is no more related to assembly then the ovenbake process. The government's arguments are no more then post-litigation rationalization designed to obscure the simple truth the only reason the duty allowance was denied was that the effect of this operation is one the government decided arbitrarily to prohibit. That finding is contrary to the plain meaning of the statute and this Court's holding in *Morrill v. Jones*.

It is interesting the government concludes its petition with the assertion that insistence of the courts below to examine Customs regulations in light of the *Mast* and *General Motors* factors is "inherently subjective," the factors to be considered may "vary from situation to situation" and thus leaves the trade community without "effective guidance." Pet. 24. *Chrysler* also alleged "the sky was falling." The government's response in Chrysler is as applicable today as it was two years ago.

> Nor is petitioner correct in asserting that, by requiring that painting processes be "minor," the court of appeals created a "highly subjective" requirement out of whole cloth, or that it has opened the door to "additional and possibly unknown conditions." As we have explained, the court's view is fully supported by the ordinary meaning of the word "incidental," which is the central criterion in the pertinent statutory language.

Brief In Opposition, *Chrysler Corporation v. United States*, No. 95-2058, note 2 at 6.

It is the statute which mandates an examination of the significance of the process. If the government believes that all permapressing or all painting, regardless of the significance of the operation, should be allowed or disallowed, their dispute should be taken to Congress and not the courts. It is patently obvious the operation at issue is incidental, and "occurs as 'a minor concomitant' of the assembly process." Pet. 18-19. It is minor from every perspective. It is subordinate to the assembly process and naturally occurs at the site of assembly.

Certainly, the factual circumstances to be considered when one is building a vehicle may vary significantly from those involved in assembling a pair of cotton trousers. That does not change the fact that the substantive decision of the courts below is consistent with the express language of the statute and the approach long followed by the courts and the Customs Service. It is an approach well understood and relied upon by the trade community and the government, and has resulted in very few disputes. The disputes have been, as here where the government has sought to question the degree of improvement, as opposed to the significance of the operation which created that improvement. These well settled expectations should not be disturbed.

It is widely acknowledged that Congress established the courts below as specialized tribunals, with unique expertise, to insure uniform national application of the tariff laws.[7] Those courts have consistently and uniformly held

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[7] Hearings before the Subcommittee On Monopolies and Commercial Law of the Committee On the Judiciary, on the Customs Courts Act of 1980, H.R. 6394, February 13 and 28, 1980. Statement of Congressman Seiberling, "Act will create a comprehensive system of judicial review of civil actions arising from import transactions, utilizing the specialized expertise ... to assure a national consistency..." *Id.* At 1; testimony of Senator Dennis DeConcini, "The U.S. Court of International Trade would continue to be equipped with the same expertise and specialized

that the degree or type of improvement, caused by a process which is otherwise incidental to assembly, is an impermissible consideration under the relevant statutory language. The government has presented no reason to question that judgment.

II. THE GOVERNMENT HAS IMPROPERLY ASKED THE COURT TO REVIEW *DICTA*

The Opinion and Judgment Order of the trial court consumes 18 pages of Petitioner's appendix, only the penultimate paragraph of which addresses the question of deference. While that paragraph acknowledges the government raised the deference to a regulation issue, it does not decide the question. The trial court merely noted that this assertion might have been put into question. T.C. Op., Pet. App. At 23a. The judgment of the trial court thus rests on its findings that the process was incidental and the attempt to interject a consideration of the degree of improvement created by that process was contrary to the plain meaning of the statute. Not only was the question of deference unnecessary and irrelevant to the judgment of the trial court, it did not even express an opinion on the subject. It is a stretch to even consider this language dictum.

The appellate court specifically upheld the findings of the trial court on the incidental nature of the process and its finding that the attempt to interject a consideration of the degree of advancement that process created was contrary to

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skills ... to insure uniformity of decision and policy to litigants with regard to the adjudication of disputes involving import transactions." *Id.* at 3; statement of Honorable Edward D. Re, Chief Judge, United States Customs Court, *Id.* at 22; statement of David M. Cohen, Director, Commercial Litigation Division, Department of Justice, "The bill will take advantage of the expertise of the Customs Court and will ensure uniformity in the important area of international trade." *Id.* at 53.

the express language of the statute. While the appellate court did express a stronger opinion on the deference question, it concluded "The decision of the Court of International Trade was correct for the reasons stated in its opinion." App. Op., Pet. App. 4a. It is thus clear that the comments of the appellate court on the deference question were neither necessary nor essential to its determination to uphold the judgment of the trial court. These comments, therefore, should be viewed as no more then *dicta*.

The government, Pet. at 23, notes the comments on deference in the instant matter are contrary to those in *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995). The government fails to note that in *Goodman*, the court, as here, found the Customs interpretation to be impermissible in light of the statutory language. It is not appropriate to ask this Court to resolve an apparent conflict between *dicta* in two separate panel opinions.

The government's string citation of recent Federal Circuit opinions, Pet. 22, likewise provides no reason to review the instant matter. The government neglects to mention that none of these cases dealt with a regulation. Classification disputes reviewed by the courts below may be based upon an *ad hoc* decision of a local Customs port official, a private letter ruling (19 CFR 177.9(b)(2)), a ruling published in the Customs Bulletin or Federal Register (19 CFR 177.10(b)), or as here, a regulation. There is certainly no reason to assume that the level of deference to be applied to these divergent situations would be uniform. *See*, for example, *Bankers Life and Casualty Company v. United States*, 1998 U.S. App. Lexis 7631 (7th Cir. 1998), description of the "free-fire zone of judicial debate" over the level of deference to be accorded to various types of interpretations by the Internal Revenue Service. Other than the *dicta* here, the government points to no other comments

or holdings of the court below dealing with the proper level of deference to a regulation with which it is dissatisfied.

It is wrong for the government to suggest, Pet. at 22, that because its request for a rehearing *en banc* was rejected further consideration below is precluded. The government's petition for a rehearing neither mentioned nor sought reconsideration of the dispositive holding by both the trial court and the appellate panel that the regulation was contrary to the plain language of the statute. The Federal Circuit is clear that where the standard of review is irrelevant to the determination, consideration of this issue would be premature and place an unnecessary burden on the respondent. *In Re Andreas G. Kemps*, 97 F.3d 1427, 1431 (Fed. Cir. 1996). Thus, rejection of the rehearing request should not be read to preclude further review of the *dicta* (or apparent conflict between panels) by the full court below.

The Congress created specialized courts with unique expertise and national jurisdiction to ensure consistent and uniform application of the Customs laws. *Supra*: Note 7 at 19. Judicial prudence suggests that those courts should be provided the opportunity to consider these issues in a case where resolution is material to the outcome and the competing considerations are fully briefed by the parties.[8] That is not the situation here. As noted *supra* at 14, the government did not even raise the issue of deference to its

[8] Interestingly, the government generally supports this approach. In the *Universal Electronics* case, 112 Fed. 488 (Fed. Cir. 1997) case, the government noted "Initially, we agree that the 'special deference' as applied by *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, may not be applicable here, but not for the reasons *Universal* expouses ... because the proper application of deference is an important issue, it is advisable to leave its applicability to an appeal where the issue must be decided, based upon factors and a record that permit the resolution of the real controversy." Brief for Appellee, *Universal Electronics Inc.* v. United States, C.A.F.C. 96-1345, note 12 at 33, 34.

regulation at trial, preferring to rest on its arguments on the "Mast" factors. The government's arguments to the appellate court, as here, discuss the deference question in the most generalized terms. The government has made little or no attempt to relate those arguments to the specific statutory provisions and court decisions applicable to tariff classification disputes.

III. THE GOVERNMENT DOES NOT FAIRLY PRESENT THE RATIONALE UNDER WHICH THE COURTS (IN CASES PROPERLY RAISING THAT ISSUE) HAVE REJECTED THE DEFERENCE STANDARD IN TARIFF CLASSIFICATION CASES

The government's suggestion that the Congressional Directive to reach the "correct decision" reflects the sole basis for the courts comments on deference is simply not accurate. For example, at oral argument Judge Clevenger chided the government for its failure to even mention, much less discuss, this Court's opinion in *Morrill v. Jones*. He noted it not only addressed the question of the ability of a regulation to alter the scope of a tariff heading, but had been cited with approval by every circuit court. No mention of this directly relevant precedent is found in the rehearing request or in the instant petition.

While the government seeks to describe the views of the courts below as a recent radical departure made without plausible explanation, they can do so only by ignoring *Jarvis Clark Co. v. United States*, 733 F.2d 873 (Fed. Cir. 1984). This case was decided shortly after the current court review provisions were enacted, and it has been cited at least 326 times without any negative references. In that case, as here, Pet. at 15, the government argued that 28 U.S.C. 2643(b), was concerned only with procedural remedies, *i.e.*, it was no more then a grant of general equity powers. The court

squarely rejected that argument based upon the historical context, which led to the passage of 28 U.S.C. 2643(b), and the desire of the Congress to eliminate a "dual burden of proof" standard. *Id.*. 876-78. Yet the government neglects to mention this decision or discuss the rationale upon which it was based.[9]

The government likewise fails to mention, much less discuss in context, the series of provisions enacted by the Congress to govern judicial review in this area of the law. 28 U.S.C. 2638, 2639(a)(1), 2640(a)(1), and 2643(b). As such its assertion, Pet. At 13, that the sole basis for the views of the courts below is the directive to "reach the correct decision," 28 U.S.C. 2643(b), represents a gross distortion. Where a regulation has not been at issue, the courts below have looked to section 2638 and concluded:

> This provision is incompatible with the notion that special deference should be given to the agency's construction of the tariff schedules; otherwise, the court's review would have to be limited to those legal grounds raised before the agency.

Anval Nyby Powder AB v. United States, 927 F. Supp. 463, 468, n. 15 (CIT 1996). 28 U.S.C. 2639 is also directly relevant since it provides that the "decision of the Secretary is presumed correct." On its face this provision appears to provide a standard of review the Congress deemed appropriate in these situations, yet the government, both here and below, neglects to even mention this provision or discuss its relevance. The government likewise ignores 28 U.S.C.

[9] The government also argues the direction to "reach the correct decision" does not distinguish the Court of International Trade from all other courts that have the same responsibility, yet they point to no similar direction in any other statute. Other than its own disbelief, the government points to no reason that Congress did not mean exactly what it said.

2640(a)(1), which requires the courts to review these matters *de novo*. Finally, the government ignores that it is the reading of all of these provisions in together and in context that has led the courts below to their views. *Iko Industries, Ltd. v. United States*, 105 F.3d 624, 626 (Fed. Cir. 1997).[10]

This reading of the Title 28 provisions is consistent with the underlying intent of the Customs Courts Act of 1980, namely consistent uniform national application of the tariff laws. The House Report cites with approval the following comments of Chief Judge Re, who noted that the proposed legislation:

> Will implement the constitutional mandate, which provides that "all duties, imports(sic), and excises shall be uniform throughout the United States," by utilizing the national jurisdiction of the Customs Court to provide uniform and consistent interpretation and application of the laws involved in disputes arising out of import transactions.

H.R. Rep. No. 96-1235, 96th Cong., 2d. Sess. 29 (1980). These sentiments were echoed by the Chairman of the House Judiciary Committee when the bill was brought to the floor. Chairman Rodino indicated the legislation was designed to create a comprehensive system of judicial review:

[10] These provisions are also consistent with a long line of court decisions, of which the Congress would be deemed aware, that any doubt in the construction of tariff terms should be resolved in favor of the importer. *Hartcraft v. Wiseman*, 121 U.S. 609, 616 (1887); *American Net & Twine Co. v. Worthington*, 141 U.S. 468, 474 (1891); *Benziger v. United States*, 192 U.S. 38, 54 (1904); *Gorton's of Gloucester, Inc. v. United States*, 52 C.C.P.A. 86, 88 (1965); *Pistorino & Company v. United States*, 82 Cust. Ct. 168, 179-80 (1979).

> Utilizing the specialized expertise of the U.S. Customs Court and the Court of Customs and Patent Appeals to insure a national uniformity in the judicial decisionmaking process ... for import transactions as required under Article I, Section 8 of the Constitution.

Congressional Record 96th Congress, Second Session, H 9342-44 (Sept. 22, 1980). The failure of the government to discuss this concept, either here or below, is crucial when one considers the implications of the "deference" which is sought. By its very terms deference implies a range of permissible choices, *i.e.*, there can be two or more "reasonable applications of the statute." Pet. at 19. Thus, if the port of New York classified a particular garment as "loungewear" and the port of Miami classified the garment as "sleepwear" – so long as both ports had a "reasonable basis" for their decisions, the court would be required to uphold both classifications. Such a result would be contrary to the premise of national uniformity upon which these court review provisions were based.

At the time the Customs Courts Act of 1980 was enacted, the Congress also must have had in mind the legal notes governing tariff classifications. The government in its petition cites frequently to General Headnote 11, Tariff Schedules of the United States[11] as the basis for its argument that the regulation at issue was statutorily authorized. In Haggar's view, that provision, on its face, only conditions a claim for duty relief on compliance with such regulations when "the facts are not determinable from an examination of the article itself in its condition as imported." This provision concerns procedural and burden of proof questions, it does not cover the substantive scope of the heading. More

[11] General Headnote 20, HTSUS.

pertinent to the issues here, the government ignores General Headnote 10, which immediately precedes the provision upon which they seek to rely.

General Headnote 10(c), TSUS, directs that "an imported article ... is classifiable in the provision which most specifically describes it." If, for whatever reason, one cannot decide which provision provides the "most specific description," General Headnote 10(d) does not direct the court to defer to the "reasonable" views of the agency, but rather to classify the goods under the provision with the highest rate.[12] If the duty rates are equal, again there is no deference to the agency position, rather the statute directs classification in the provision "which first appears in the schedules." General Rule of Interpretation 3 of the HTSUS provides similar, although somewhat different rules which direct classification first under the provision which provides "the most specific description", if that cannot be decided then one looks to "essential character" of the article, and if the answer is still not clear one classifies the goods under the provision "which occurs last in numerical order." In short, the tariff schedules do not contemplate a range of permissible choices. Whenever the decision cannot be clearly made, classification is based upon the relative positions of the competing provisions in the tariff schedules and is not based upon deference to the views of the agency.[13]

[12] The government may be defending a provision with a lower duty because of quota or other implications, or may be defending a protest by an American manufacturer. 19 U.S.C. 1516.

[13] These provisions do not appear to provide the Customs Service the latitude to make "wise policy" choices (Chevron, 467 U.S._____ at 864) on the proper classification of imported merchandise. Indeed, when these provisions were enacted, Customs was statutorily precluded in many instances from exercising such policy judgments. 19 U.S.C. 1502(b) (1992). Moreover, when the current HTSUS was adopted in 1988, Congress explicitly granted policy making responsibility to the

The above discussion is not meant to be an exhaustive analysis of all of the potential issues involved in the question of the appropriate level of deference to be accorded a regulation in a tariff classification dispute. It does reflect, however, that such a decision requires a careful consideration of both the substantive and court review provisions which Congress has enacted to govern these questions. Nearly 50 years ago Justice Frankfurter noted the desirability of an issue being "further illumined by the lower courts," and observed that "Wise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950). That is not the situation here. For nearly 20 years the government was not only content with the standard of review applied by the courts below, but defended it under the statutory language it helped to draft and supported. *See: Statement of David M. Cohen, Director Commercial Litigation Branch, Department of Justice, Hearings before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, on the Customs Courts Act of 1980, at 52-53.* Inexplicably, the government has shifted course and sought "controlling weight" deference for every decision of the Customs Service, regardless of its pedigree. It has done so without any meaningful attempt to relate its new position to the detailed statutory provisions at issue or the historical context which lead to their passage. Resolution of the conflicting *dicta* on the government's new position should be left "to an appeal where the issue must be decided, based upon factors and a record that permit resolution of the real controversy. *See* Note 8, *supra* at 22.

United States Trade Representative and not to the Customs Service. 19 U.S.C. 1309, 1310.

CONCLUSION

The decisions below were based upon the application of a balancing test long applied by the relevant courts and the administrative agency, and a finding that the additional condition which the government sought to impose was contrary to the plain language of the statute. It is for this judgment that review is sought and petitioner has failed to provide a rationale basis for that request. The government does not dispute the applicability of the test, quite the contrary, it has argued that the plain meaning of the statute requires that approach be applied to the examples found in the statute and the regulations. Nor has the government presented any argument to refute the finding that the additional condition it sought to impose was contrary to the express language and intent of Congress.

There is even less justification to review the *dicta* on deference to a regulation. The government points to no other holding or *dicta* concerning the application of a regulation with which it is dissatisfied, and argues the comment in question is contrary to other panel decisions. Sound judicial administration requires that these issues be decided in cases where the issues are material and have been fully briefed.

Haggar should not be put to the burden of further litigation on an irrelevant issue.

Respectfully submitted.

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APPENDIX

APPENDIX

TITLE 28

§ 2638. New grounds in support of a civil action

In any civil action under section 515 of the Tariff Act of 1930 in which the denial, in whole or in part, of a protest is a precondition to the commencement of a civil action in the Court of International Trade, the court, by rule, may consider any new ground in support of the civil action if such new ground –

(1) applies to the same merchandise that was the subject of the protest; and

(2) is related to the same administrative decision listed in section 514 of the Tariff Act of 1930 that was contested in the protest.

§ 2639. Burden of proof; evidence of value

(a)(1) Except as provided in paragraph (2) of this subsection, in any civil action commenced in the Court of International Trade under section 515, 516, or 516A of the Tariff Act of 1930, the decision of the Secretary of the Treasury, the administering authority, or the International Trade Commission is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision.

§ 2640. Scope and standard of review

(a) The Court of International Trade shall make its determinations upon the basis of the record made before the court in the following categories of civil actions:

(1) Civil actions contesting the denial of a protest under section 515 of the Tariff Act of 1930.

(2) Civil actions commenced under section 516 of the Tariff Act of 1930.

§ 2642. Analysis of imported merchandise

The Court of International Trade may order an analysis of imported merchandise and reports thereon by laboratories or agencies of the United States.

GENERAL HEADNOTE 10 OF THE TARIFF SCHEDULE OF THE UNITED STATES
19 U.S.C. 1202

(c) an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it; but, in applying this rule of interpretation, the following considerations shall govern:

(i) a superior heading cannot be enlarged by inferior headings indented under it but can be limited thereby;

(ii) comparisons are to be made only between provisions of coordinate or equal status, i.e., between the primary or main superior headings of the schedules or between coordinate inferior headings which are subordinate to the same superior heading;

(d) if two or more tariff descriptions are equally applicable to an article, such article shall be subject to duty under the description for which the original statutory rate is highest, and, should the highest original statutory rate be applicable to two or more of such descriptions, the article shall be subject to duty under that one of such descriptions which first appears in the schedules;

19 CFR 10.16

(b) ***Operations incidental to the assembly process.*** Operations incidental to the assembly process whether performed before, during, or after assembly, do not constitute further fabrication, and shall not preclude the application of the exemption. The following are examples of operations which are incidental to the assembly process:

(1) Cleaning;

(2) Removal of rust, grease, paint, or other preservative coating;

(3) Application of preservative paint or coating, including preservative metallic coating, lubricants, or protective encapsulation;

(4) Trimming, filing, or cutting off of small amounts of excess materials;

(5) Adjustments in the shape or form of a component to the extent required by the assembly being performed abroad;

(6) Cutting to length of wire, thread, tape, foil, and similar products exported in continuous length; separation by cutting of finished components, such as prestamped integrated circuit lead frames exported in multiple unit strips; and

(7) Final calibration, testing, marking, sorting, pressing, and folding of assembled articles.

HQ 556836

December 8, 1992

CLA-2 CO:R:C:S 556836 RAH

CATEGORY: Classification

TARIFF NO.: 9802.00.80(EN)

Ms. Sandra L. Haupt
CJ Tower, Inc.
128 Dearborn Street
Buffalo, New York 14207-3198

RE: Applicability of subheading 9802.00.80(EN), HTSUS, to U.S.-manufactured cells exported to Canada where they are charged and assembled into batteries

Dear Ms. Laupt:

This is in response to your letter of July 13, 1992, on behalf of GNB Batteries (Canada) Inc., and a "FAX" from Mr. Larry Clark dated October 29, 1992, requesting a ruling regarding certain lift truck batteries.

FACTS:

GNB Batteries, Inc. intends to import U.S.-manufactured cells into Canada on a temporary importation basis. In Canada, the cells are charged and assembled into lift truck batteries. The articles are then exported back to the United States.

The primary use of the article in the United States is to power electric fork lift trucks mainly for traction and lifting power.

The article is described as an Industrial Lead Acid Battery. It has been previously entered under subheading 8507.20.0000(EN), Harmonized Tariff Schedule of the United States (HTSUS), dutiable under the Canadian Free Trade Agreement, at the rate of 3.1 percent.

In his "FAX", Mr. Clark describes the assembly operation. The six cells are securely inserted into a steel tray. Each cell is connected to another by an intercell connector. A cable is drawn from the negative cell combination and a second cable from the positive cell combination. The two separate cables are then joined at the ends to a charging plug. Plastic shrouds are attached to the top of the intercell and terminal connectors to prevent shorting. The battery is then placed on a shipping skid. All the parts are of U.S. origin except tubing, intercell and terminal connectors and shipping skid and decal.

Charging the cells, which is done before the assembly operation, entails adding water and acid to the cells. They are then hooked up to charging panels and charged from 88 to 96 hours. The cells are fully charged at this point and ready to be put into the steel trays.

Mr. Clark states that the Canadian labor accounts for approximately 5 percent of the total battery value.

ISSUE:

Whether the assembly of the U.S.-manufactured cells into an industrial lead acid battery qualifies for the partial duty exemption available under subheading 9802.00.80(EN), Harmonized Tariff Schedule of the United States (HTSUS), when returned to the United States.

LAW AND ANALYSIS:

All articles imported into the U.S. are subject to duty unless specifically exempted therefrom under the HTSUS.

Subheading 9802.00.80(EN), HTSUS, provides a partial duty exemption for:

[a]rticles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process, such as cleaning, lubricating and painting.

All three requirements of subheading 9802.00.80(EN), HTSUS, must be satisfied before a component may receive a duty allowance. An article entered under this tariff provision is subject to duty upon the full appraised value of the imported assembled article, less the cost or value of the U.S. components assembled therein, upon compliance with the documentary requirements of section 10.24, Customs Regulations (19 CFR 10.24).

Section 10.14(a), Customs Regulations (19 CFR 10.14(a)), states in part that:

[t]he components must be in condition ready for assembly without further fabrication at the time of their exportation from the United States to qualify for the exemption. Components will not lose their entitlement to the exemption by being subjected to operations incidental to the assembly either before, during, or after their assembly with other components.

Section 10.16(a), Customs Regulations (19 CFR 10.16(a)), provides that the assembly operation performed abroad may consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, lamination, sewing, or the use of fasteners.

The operations performed in the instant case (fastening and force fitting parts together) constitute acceptable assembly operations as delineated in 19 CFR 10.16(a). Moreover, we find that charging the U.S.-origin cells is a relatively minor operation requiring nominal labor which entails adding water and acid to the cells and hooking them up to charging panels. We understand in this regard that the cost of the charging operation represents less than .5 percent of the cost of the cells. Therefore, we conclude that assembly of the U.S.-manufactured cells into an industrial lead acid battery is an acceptable assembly operation under subheading 9802.00.80(EN), HTSUS, and that charging the cell before such assembly is incidental thereto.

HOLDING:

On the basis of the information presented, it is our opinion that the operations performed abroad to create the battery are considered proper assembly operations or operations incidental thereto. Therefore, the batteries may enter under subheading 9802.00.80(EN), HTSUS, with allowances in duty for the cost or value of the U.S.-origin components incorporated therein, upon compliance with the documentary requirements of 19 CFR 10.24. No allowance may be granted for the cost or value of the foreign- origin components, the water or the acid.

Sincerely,
John Durant, Director
Commercial Operations Division

HQ 556362
February 16, 1993

CLA-2 CO:R:C:S 556362 WAW

CATEGORY: Classification

TARIFF NO.: 9802.00.80(EN)

District Director
U.S. Customs Service
International & Terrace Sts
Nogales, Arizona 85621

RE: Application for Further Review of Protest No. 2604-91-100030; multiple outlet strips; painting; 9802.00.80(EN); incidental to assembly

Dear Sir:

This is in response to the above-referenced protest which was forwarded to our office concerning the applicability of the partial duty exemption under subheading 9802.00.80(EN), Harmonized Tariff Schedule of the United States Annotated (HTSUSA), to multiple outlet strips from Mexico.

FACTS:

S.L. Waber imports multiple outlet strips from Mexico, which consist of a can, a back, and various other subassemblies (i.e., circuit breakers, wires, switches, etc.). Your office denied the partial duty exemption under subheading 9802.00.80(EN), HTSUSA, because the cans and backs were painted in Mexico. Protestant maintains that the

subject entries should be entitled to the partial duty exemption under subheading 9802.00.80(EN), HTSUSA.

Protestant sends unpainted cans and backs suitable for use in the production of the multiple outlet strips to Mexico where they are painted and then assembled with various other subassemblies into the finished article. The cans and backs used on the multiple outlet strips are received in bulk from protestant's suppliers. These parts are bulk released to protestant's paint department. The paint department unloads the cans or backs onto a chain conveyor that carries them through a spray wash and dry system to remove the die oils used by the U.S. suppliers to manufacture the parts in their punch presses and dies. The parts are then loaded onto tree racks (five backs or five cans per rack), on a progressive paint conveyor. The first stage of the conveyor is a final dry stage. The second stage is the paint booth where the rack spins and all five parts pass in front of an electrostatic spray gun and are painted with one coat of paint. Protestant states that the outside of the cans receive more paint than the inside due to the hanging method and tree rack design. During the third stage of production, the conveyor carries the parts into a propane fired drying oven for final paint drying. The conveyor exits the oven to stage four where the parts are unloaded onto pallets. The conveyor continues forward to the loading stage. The cans and backs are stored and issued to final assembly along with all other raw materials necessary to build the final product. After the cans and backs are painted the subassemblies are prepared and the components are loaded onto the can. The cans and backs may be painted a variety of colors, depending upon customer specification. Finally, the finished multiple outlet strip is tested and labeled, before it is packaged for shipment to the U.S. Protestant states that approximately 22 components are assembled manually by means of both soldering and screwing operations.

The time and costs necessary for washing and painting a set (can/back) of parts is as follows:

Item	Cost	Paint Labor	Paint Overhead	Total
Can	$.485/ea	$.00744/ea	$.04464/ea	$.53708
Back	.115/ea	.00558/ea	.03348/ea	.15406
Paint	.086/set	0	0 .086	
	$.686/set	$.01302/set	$.07812/set	$.77714/set

The total assembly value of a multiple outlet strip is calculated to be $5.42028/unit.

ISSUE:

Whether the multiple outlet strip from Mexico is entitled to the partial duty exemption available under subheading 9802.00.80(EN), HTSUSA, when returned to the U.S.

LAW AND ANALYSIS:

Subheading 9802.00.80(EN), HTSUSA, provides a partial duty exemption for:

> [a]rticles assembled abroad in whole or in part of fabricated
> components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubrication, and painting. . .

All three requirements of subheading 9802.00.80(EN), HTSUSA, must be satisfied before a component may receive a duty allowance. An article entered under this tariff provision is subject to duty upon the full value of the imported assembled article, less the cost or value of such U.S. components, upon compliance with the documentary requirements of section 10.24, Customs Regulations (19 CFR 10.24).

Section 10.14(a), Customs Regulations (19 CFR 10.14(a)), states in part that:

[t]he components must be in condition ready for assembly without further fabrication at the time of their exportation from the United States to qualify for the exemption. Components will not lose their entitlement to the exemption by being subjected to operations incidental to the assembly either before, during, or after their assembly with other components.

Section 10.16(a), Customs Regulations (19 CFR 10.16(a)), provides that the assembly operation performed abroad may consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing, or the use of fasteners.

Operations incidental to the assembly process are not considered further fabrication operations, as they are of a minor nature and cannot always be provided for in advance of the assembly operations. However, any significant process, operations or treatment whose primary purpose is the fabrication, completion, physical or chemical improvement of a component precludes the application of the exemption under subheading 9802.00.80(EN), HTSUSA, to that component. See 19 CFR 10.16(c).

We have previously held that dipping an article into waterbase paint for rust protection purposes is considered an acceptable incidental operation pursuant to 19 CFR 10.16(b)(3), which states that the application of preservative paint or coating is an incidental operation. See Headquarters Ruling Letter (HRL) 555569 (19 CFR 10.16(b)(3)). In the instant case, protestant states that the primary purpose of applying paint to the cans and backs of the multiple outlet strip is to protect these components from rust over the years. Moreover, based on the information provided in your submission regarding the cost and time of the painting operation, it appears that the operation is minor in comparison to the total assembly of the multiple outlet strips. Therefore, we are of the opinion that the painting operation is considered an operation incidental to the assembly process pursuant to 19 CFR 10.16(b)(3).

HOLDING:

Based on the information presented, it is our opinion that the operations performed abroad to create the multiple outlet strips are considered proper assembly operations or operations incidental to the assembly process. Therefore, the imported multiple outlet strips may be entered under subheading 9802.00.80(EN), HTSUSA, with allowances in duty for the cost or value of the U.S. components incorporated therein, upon compliance with the documentary requirements of 19 CFR 10.24.

This protest is hereby granted in full. A copy of this decision should be attached to the Customs Form 19 and mailed to the protestant as part of the notice of action on the protest.

Sincerely,
John Durant, Director
Commercial Rulings Division

(3)

FILED
SEP 2 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-2044

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

HAGGAR APPAREL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION

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Department of Justice
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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION

Respondent offers several erroneous rationales in its effort to avoid review of the holding of the court of appeals that "Customs' regulations interpreting and applying [the Tariff Act] are [not] entitled to deference under *Chevron*" (Pet. App. 3a). First, notwithstanding the clear language of the decision below, respondent asserts that the court of appeals actually made no such holding. Second, implicitly acknowledging that the court of appeals in fact *did* hold that the agency's regulations are entitled to no deference, respondent argues that such a holding draws support from theories that the court of appeals itself has not endorsed. Finally, respondent seeks to sidestep the refusal of the

court of appeals to defer to the regulation by arguing that the regulation is, in any event, invalid on the merits. Nothing in respondent's submission detracts from the obvious importance of the express refusal of the court of appeals to adhere to this Court's decision in *Chevron* and to defer to the regulations issued by the agency that Congress has "charged with responsibility for administering" the statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984).

1. Respondent's principal contention is that the clear holding of the court of appeals that it would not defer to the agency's regulations under *Chevron* (Pet. App. 3a) is "no more than dicta" (Br. in Opp. 21). This characterization of the Federal Circuit's unambiguous rejection of deference for the agency's regulations is refuted by the plain text of the court's decision.[1] The opinion is emphatic in rejecting (Pet. App. 3a)

> the United States' argument that Customs' regulations interpreting and applying this statute are entitled to deference under *Chevron* * * * . As we have recently held in several cases, the United States' argument is without merit. See *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997) (no *Chevron* deference applies to classification decisions); *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491-93 (Fed. Cir. 1997) ("neither this court nor the Court of International Trade defers to Custom's interpretation of a tariff heading on the basis of special deference pursuant to [*Chevron*]").

[1] Respondent acknowledges that "the government raised the deference * * * issue" (Br. in Opp. 20) in the courts below. See Pet. App. 23a (noting that the government "argues that Customs is entitled to deference pursuant to *Chevron*").

Respondent errs in asserting that this express rejection of deference to the agency's regulations was unnecessary to the decision of the court of appeals. The court of appeals did not hold in the alternative, as respondent mistakenly implies (Br. in Op. 20-21), that the regulation is invalid on the theory that it conflicts with the plain language of the statute. Indeed, because the court of appeals refused to afford any deference to the agency's regulations, the court did not even consider or address whether the regulation is a *permissible* construction of the vague statutory provision. Instead, stating that the proper construction of the statute is a matter for the courts to resolve "*de novo*" (Pet. App. 4a), the court of appeals simply ignored the regulation in holding that the trial court had properly balanced "the relevant * * * factors" in determining that respondent's permapressing operation is "'incidental to the assembly process' within the meaning of the statute" (*id.* at 3a). The court of appeals only thereafter addressed the contrary determination of the regulation and stated simply that it would not defer to it (*ibid.*).

In so ruling, the court of appeals did not state or hold that the regulation in any manner conflicts with the statute. Instead, the court stated that the regulation is not "entitled to deference under *Chevron*" and is therefore simply not relevant to a proper interpretation of the statute (Pet. App. 3a).

Respondent points out (Br. in Opp. 21) that, in approving the trial court's balancing of "the relevant * * * factors," the court of appeals emphasized that the statutory tariff exception does not prohibit an operation that results in an "advancement in value" so long as "the operation in question is incidental to the assembly process" (Pet. App. 3a). Contrary to respondent's suggestion, however, the court of appeals

did not address or consider whether the agency's regulation violates that statutory principle. See Pet. App. 3a. As we explain in the petition and in further detail below, nothing in the regulation provides (or even suggests) that the statutory tariff exception is inapplicable whenever an operation yields an "advancement in value." Instead, the regulation narrowly provides that certain specified types of chemical treatment of cloth that cause an advancement in value (such as permapressing) are sufficiently unrelated to assembly that they do not qualify as "incidental to assembly" within the scope of the statutory tariff exception. See Pet. 17-21; pages 8-9, *infra*. That regulatory interpretation, which is expressly consistent with the statutory principle on which the court of appeals relied, draws ample support from the findings of the trial court in this case. See Pet. 18-19. Indeed, it was only by substituting its own "balancing" of the "relevant factors" for the balance struck by the agency in adopting the regulation that the trial court reached a different result in this case.

The sole rationale offered by the court of appeals for declining to follow the agency's regulation was the court's broad conclusion that *none* of the regulations of the Customs Service interpreting this statute are entitled to deference (Pet. App. 3a). The opinion of the court of appeals makes clear that this broad holding is the basis for its decision (*ibid.*). In the absence of review by this Court, the decision of the Federal Circuit in this case will thus deprive the entire body of Treasury regulations that interpret the Tariff Acts'

detailed classification provisions of any force in customs adjudication. See Pet. 24-25.[2]

2. a. The only justification given by the court of appeals for its broad refusal to defer to the agency's regulations is that 28 U.S.C. 2643(b) directs the Court of International Trade to "reach the correct decision" in the cases within its jurisdiction (Pet. App. 4a, quoting *Rollerblade, Inc.* v. *United States*, 112 F.3d at 484). That implausible rationale is unpersuasive for the reasons described in detail in the petition (Pet. 13-16). Indeed, respondent does not attempt to defend the court's reasoning on its own terms. Instead, respondent incorrectly asserts that the court's stated rationale was not "the sole basis" for its refusal to defer to the regulation (Br. in Opp. 24). A simple reading of the opinion below and of the decisions cited in that opinion, however, confirms that the sole basis for the court's refusal to defer to the regulation was expressly and specifically that "the duty to 'reach the correct decision'" (Pet. App. 4a) is vested in the Court of International Trade under 28 U.S.C. 2643(b). As we explain in the petition (Pet. 14-16), nothing in that statute provides support for the extraordinary conclusion of the court of appeals that, in customs cases, the Court of International Trade need not—and should not—adhere to the decision of this Court in *Chevron*.

Although respondent asserts that the decision of this Court in *Morrill* v. *Jones*, 106 U.S. 466 (1882), is

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[2] Respondent asserts that it is inconsistent for the Customs Service to support application of the *Mast* factors in some circumstances and not support them in the present case (Br. in Opp. 18). That contention ignores the obvious fact that the Customs Service does not support application of the *Mast* factors when, as here, a governing regulation applies instead.

"relevant precedent" (Br. in Opp. 23), respondent fails to offer any explanation of *how* that decision is relevant. In fact, it is not. The *Morrill* decision stands for the unexceptional proposition that "[t]he Secretary of the Treasury cannot by his regulations alter or amend a revenue law." 106 U.S. at 467. That holding is, of course, consistent with the established rule that, when Congress has "left ambiguity in a statute meant for implementation by an agency," there is "a presumption that Congress * * * understood that the ambiguity would be resolved, first and foremost, by the agency" rather than by the courts.[3] *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996).

b. Respondent urges that a "series of provisions" (Br. in Opp. 24) governing judicial review of Customs Service determinations has some role in determining whether deference is due to the agency's regulations. In addition to 28 U.S.C. 2643(b), on which the court of appeals relied, respondent suggests that 28 U.S.C. 2638, 2639(a)(1) and 2640(a)(1) are also somehow relevant. Respondent fails, however, to identify any particular language in any of these additional statutory provisions

[3] Respondent also errs in relying (Br. in Opp. 23) on *Jarvis Clark Co.* v. *United States*, 733 F.2d 873 (Fed. Cir. 1984). That decision explains that the statutory directive that the Court of International Trade "order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision" (28 U.S.C. 2643(b)) was enacted to overcome the "dual burden of proof" doctrine that had required importers to show that the government's proposed tariff rate was wrong and also to establish "the proper alternative classification." 733 F.2d at 876. That explanation of Section 2643(b) in *Jarvis Clark Co.* provides no support whatever for respondent's contention that the statute authorizes the courts to decline to give deference to the agency's regulations.

that addresses the degree of deference to be given to Customs Service interpretations of the Tariff Act.

28 U.S.C. 2638 allows a party seeking review of a tariff protest denial to raise "any new ground," so long as certain conditions are present. 28 U.S.C. 2639(a)(1) states that the agency's denial of a protest "is presumed to be correct." 28 U.S.C. 2640(a)(1) directs the Court of International Trade to "make its determinations upon the basis of the record made before the court * * *." None of these provisions has any application to this case, and the courts below did not invoke or in any manner seek to rely upon them. These additional statutory provisions that respondent now urges as an alternative basis for the decision in this case (i) were not even cited by the courts below and (ii) do not provide even a hint of support for the proposition that the agency's regulations "are entitled to [no] deference under *Chevron*" (Pet. App. 3a).[4]

c. The Court of International Trade, like the Tax Court and other specialized tribunals, has a narrow jurisdiction within which it possesses a presumed expertise. It is well established, however, that deference is owed to agency regulations in these specialized federal courts as well as in federal courts of general jurisdiction.[5] See, *e.g.*, Chief Judge Edward D. Re,

[4] In this context, the suggestion of respondent that the government engaged in a "gross distortion" (Br. in Opp. 24) by failing to discuss the irrelevant statutory provisions that respondent now cites—provisions that were neither considered nor addressed by the courts below—is inexplicable.

[5] See, *e.g.*, *Mapco Int'l* v. *FERC*, 993 F.2d 235, 239 (Temp. Emer. Ct. App. 1993); *Square D Co.* v. *Commissioner*, 109 T.C. 200, 225 (1997); *Alumax Inc.* v. *Commissioner*, 109 T.C. 133, 192 (1997); *Wright* v. *Gober*, 10 Vet. App. 343, 351 (Vet. App. 1997); *Davis* v. *Brown*, 10 Vet. App. 209, 213 (Vet. App. 1997).

Litigation Before the United States Court of International Trade, 19 U.S.C.A. 1-1300, at XLI (West Supp. 1998); Pet. 16. It is precisely in cases involving such specialized tribunals that this Court has frequently emphasized that "the task that confronts us is to decide, not whether the Treasury regulation represents the best interpretation of the statute, but whether it represents a reasonable one." *Atlantic Mutual Ins. Co.* v. *Commissioner*, 118 S. Ct. 1413, 1418 (1998). See also Pet. 12.

Respondent simply ignores this established precedent in erroneously contending that the "specialized" (Br. in Op. 22) nature of the Court of International Trade allows it to discard as irrelevant the formal regulations adopted by the Treasury under the Tariff Act.[6] The expertise of the Court of International Trade should be used to apply the Customs Service regulations, not to rewrite or ignore them.

3. a. Respondent engages in a lengthy attack on the reasonableness of the regulation (Br. in Opp. 11-20). That issue, which goes to the ultimate merits of this particular tariff dispute, need not even be addressed by the Court at this time. As we note in the petition, the Court could elect (i) to resolve at this time only the question of the proper degree of deference owed to the agency's regulation and (ii) then remand the case for consideration of the merits of the regulation under that proper standard. Pet. 17 n.6.

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[6] Judicial deference to the authorized regulations issued by the Customs Service enhances, and does not undermine, the legislative goal of providing "uniform and consistent interpretation and application of the laws involved in disputes arising out of import transactions" (Br. in Opp. 25, quoting from H.R. Rep. No. 1235, 96th Cong., 2d Sess. 29 (1980)).

Respondent's quarrel with the reasonableness of the particular regulation involved in this case is, in any event, incorrect for the reasons summarized in the petition. See Pet. 17-21. In essence, the regulation is an appropriate interpretation of the statute because a permapressing operation falls within the general guidelines for processes that are "not * * * regarded as incidental" to assembly (19 C.F.R. 10.16(c)). That is because permapressing (like other similar chemical treatments of cloth) is a "significant process * * * which is not related to the assembly process" (*ibid.*). As we explain in the petition (Pet. 17-18), that regulatory determination draws substantial support from the findings in this case. Even if some other viewpoint could also be defended as "reasonable," the conclusion reached in the regulation cannot itself be said to be "unreasonable" and therefore must be sustained. *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 842-844.

4. The Federal Circuit's rejection of deference for the agency's substantive interpretations of the classification provisions of the Tariff Act is a matter of exceptional importance that warrants this Court's review. By denying any deference for the agency's regulations under the Tariff Act, the court of appeals has, for purposes of customs adjudication, essentially nullified the express statutory delegation of rulemaking authority to the agency. By making customs determinations turn in every instance on a judicial "balancing" of "relevant factors," the decision in this case makes the customs process far less predictable, and thus more litigious and costly, both for importers and for the United States. See Pet. 24-25.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

SEPTEMBER 1998

(10)

No. 97-2044

FILED
NOV 9 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

v.

HAGGAR APPAREL COMPANY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED: JUNE 18, 1998
CERTIORARI GRANTED: SEPTEMBER 29, 1998

132 pp

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UNITED STATES COURT OF
INTERNATIONAL TRADE

Docket No. 93-06-00343

HAGGAR APPAREL COMPANY, PLAINTIFF

v.

UNITED STATES, DEFENDANT

DOCKET ENTRIES

DOCKET NUMBER	DATE	PROCEEDINGS
1993		
(1)	Jun 16	Summons filed. wc
(2)	Jun 21	Motion by Pltf to amend the summons. vad
(3)	Jun 21	Complaint by pltf. vad
(4)	Aug 9	Motion by Deft for EOT until 8/30/93 to respond to Pltf's motion to amend the summons w/consent to Pltf. vad
(5)	Aug 10	Order Granting Deft's consent motion for EOT until 08/30/93.

DOCKET NUMBER	DATE	PROCEEDINGS
(6)	Aug 19	Deft noted their consent to pltf's motion to amend the summons. vad
(7)	Aug 27	Pltf's motion to amend summons GRANTED. sg
(8)	Sep 29	Deft filed consent motion for EOT until Oct 23/93 to answer Pltf's complaint. sg
(9)	Sep 30	Defts' consent motion for EOT until Oct 23/93 (8) GRANTED. sg
(10)	Oct 25	Answer filed by Deft. smw
(11)	To Wit Nov 23	Motion by Pltf for EOT until 1/28/94 to respond to Deft's first set of interrogatories. w/consent of Deft. vad
(12)	Nov 30	Order Granting Pltf's motion for EOT until 01/29/94. vad
1994		
(13)	Jan 3	Assigned to Chief Judge DiCarlo. jp

DOCKET NUMBER	DATE	PROCEEDINGS
(14)	To Wit Jan 25	Pltf filed consent motion for EOT until 02/28/94 to respond to Deft's first interrogatories. smw
(15)	Feb 07	Pltf's consent motion for EOT until 02/28/94 to Respond to Deft's First Interrogatories GRANTED. jp
(16)	To Wit Feb 25	Pltf filed consent motion for EOT until Mar 31/94 which to serve a response to Deft's first interrogatories and request for production.
(17)	Mar 4	Pltf's consent motion for EOT until Mar 31/94 to serve a response to Deft's first interrogatories and request for production GRANTED. No further extensions will be granted.
(18)	To Wit Mar 4	Pltf filed proposed scheduling order. smw

DOCKET NUMBER	DATE	PROCEEDINGS
(19)	Mar 18	SCHEDULING ORDER: Discovery shall be completed by Oct 1/94; All dispositve motions or request for trial shall be filed by Nov 15/94; Trial shall take place on Jan 15/95 at a time and place to be announced at a later date. jp
(20)	Mar 25	Parties filed proposed stipulation and protective order. sg
(21)	Apr 1	Proposed Stipulation and Protective Order GRANTED. jp
(22)	Sep 19	Deft filed consent motion for EOT until 10/22/94 to respond to Pltf's discovery. smw
(23)	Sept 23	Deft's consent motion for EOT until 10/22/94 to respond to Pltf's discovery GRANTED. jp
(24)	To Wit Oct 3	Pltf filed consent motion for EOT until Nov 30/94 to conduct discovery. sg

DOCKET NUMBER	DATE	PROCEEDINGS
(25)	Oct 17	Pltf's consent motion for EOT until Nov 30/94 to conduct discovery GRANTED. JP
(26)	To Wit Oct 25	Pltf filed request for trial to be held on or about Jan 24-26/95 at Dallas Texas. sg
(27)	To Wit Oct 25	Pltf filed consent motion to designate as a test case. sg
(28)	Nov 4	Pltf's consent motion to designate (#27) GRANTED ORDERED. This case is designate as a test case. smw
(29)	Dec. 5	ORDERED that the trial in this action will begin on January 24 1995 at Dallas Texas. jp
1995		
(30)	Jan 13	Pltf filed pretrial brief (CONFIDENTIAL). ats
(31)	Jan 13	Deft filed pretrial memorandum. ats

DOCKET NUMBER	DATE	PROCEEDINGS
(32)	Jan 19	Parties filed proposed Pre-Trial order. ats
(33)	Jan 20	Pltf filed Pretrial Brief (PUBLIC VERSION). jp
(34)	To Wit Jan 20	Pltf filed Pretrial Brief. [Public]. sg
(35)	Feb 7	Transcript filed of trial held on 1-24-95 in Dallas, TX. ats
(36)	Feb 7	Transcript filed of trial held on 1-25-95 in Dallas, TX. ats
(37)	To Wit Mar 6	Pltf. field consent motion for EOT until 3/23/95 to file its post trial brief.
(38)	Mar 13	Parties filed stipulated facts.
(39)	Mar 17	Pltf's consent motion for EOT until Mar 23/95 to file its post trial brief GRANTED. jp
(40)	To Wit Mar 23	Pltf filed Post Trial Brief. sg

DOCKET NUMBER	DATE	PROCEEDINGS
(41)	Apr 27	Deft filed consent motion for EOT to respond to Pltf's brief. ws
(42)	May 3	Deft's consent motion for EOT until May 27/95 to respond to Pltf's Brief GRANTED. jp
(43)	May 30	Deft filed consent motion for EOT until Jun 6/95 to respond to Pltf's brief GRANTED. sg
(44)	Jun 1	Deft's consent motion for EOT until Jun 6/95 to respond to Pltf's brief GRANTED. jp
(45)	Jun 6	Deft filed post trial brief. ws
(46)	Jun 23	Pltf filed consent motion for EOT until Jul 10/95 to file its post-trial brief. ws
(47)	Jul 6	Pltf's consent motion for EOT until Jul 10/96 to file its Post-Trial Reply Brief GRANTED. jp

DOCKET NUMBER	DATE	PROCEEDINGS
(48)	To Wit: Jul 10	Pltf filed motion for EOT until Jul 20/95 to file its post-trial brief. ws
(49)	Jul 21	Pltf's motion for EOT until July 20, 1995 to file it post-trial brief GRANTED.
(50)	Jul 21	Pltf filed Post -Trial Reply Brief. sg
(51)	Aug 8	Deft field consent motion for leave to file a sur-reply. ws
(52)	Aug/21	Pltf Haggar's filed its response to deft's consent motion for leave to file a sur-reply brief and memorandum of alw. jro
1996		
(53)	Jan 25	Joint Stipulation filed for Revised Selected Costs and Times Pursuant to Question 3A in the Court's 12/27/95

DOCKET NUMBER	DATE	PROCEEDINGS
(54)	Jan 26	DOJ filed letter in response to your Honor's letter of 12-27-95, where the court requested the parties to address four questions that were raised as a result of parties' briefs. ws
(55)	Jan 29	Pltf filed response to the Court's questions contained in your Honor's 12-27-95 letter. ws
(56)	Feb 05	Deft's consent motion for leave to file a sur-reply (#51) GRANTED. jpr
(57)	Feb 05	Deft filed Sur-Reply Brief to Pltf's Brief. jpr
(58)	Feb 05	Joint Stipulation for Revised selected costs and times pursuant to questions 3A in the Court's December 27/95 request GRANTED. jpr
(59)	July 12	Slip op. 96-110 Judgment for Plaintiff. st

DOCKET NUMBER	DATE	PROCEEDINGS
(60)	Jul 19	Pltf filed motion to amend judgement order (re: Slip. Op. 96-110).
(61)	July 26	Pltf's motion to amend the judgment order GRANTED.
(62)	July 26	AMENDED JUDGMENT ORDER: ORDERED that Customs grant a duty allowance under TSUS item 807.00 and HTSUS subheading 9802.00.80, for Haggar's Model 245 men's pants, fabric style 2010; and it is further ORDERED that the US Customs Service shall reliquidate the entries accordingly and shall refund all excess duties with interest as as provided by law. ORDERED that the action is DISMISSED. jpr
(63)	Sep 9	Deft filed Notice of Appeal. ws
(64)	Oct 7	CAFC issued Docket No. 97-1002 on Oct 1/96. jpr

COURT OF INTERNATIONAL TRADE
FOR THE FEDERAL CIRCUIT

No. 97-1002

HAGGAR APPAREL COMPANY, PLAINTIFF

v.

UNITED STATES, DEFENDANT

DOCKET ENTRIES

DOCKET NUMBER	PROCEEDINGS
1.	CERTIFICATE OF INTEREST FOR THE APPELLANT. (MS-10/10/96) FILED: 10/11/96. (EOD 10/11/96 BY FD.)
2.	APPELLANT -- CONSENT MOTION FOR THIRTY DAY ENLARGEMENT OF TIME TO FILE BRIEF. (MPF) (MS-11/12/96) FILED 11/13/96. ON CONSENT. ACTION ON MOTION (3): GRANTED. BY CLERK. FILED: 11/13/96. (EOD 11/13/96 LP) THE BRIEF IS DUE ON 12/30/96. 97-1002
3.	Appellant - CONSENT MOTION FOR EXTENSION OF TIME FOR 16-DAYS TO FILE BRIEF. (MS-12/12/96) FILED: 12/13/96. ON CONSENT. ACTION ON MOTION (5: GRANTED BY CLERK. FILED 12/13/96. (EOD 12/13/96 BY LP) THE BRIEF IS DUE ON 01/15/97. 97-1002

DOCKET NUMBER	PROCEEDINGS
	U.S. [APPELLANT] - BRIEF FOR APPELLANT, THE U.S. (MS-01/10/97). FILED: 01/10/97. [972810] (EOD 01/23/97 BY AW) 97-1002
5.	Appellee - CONSENT MOTION FOR THIRTY DAY EXTENSION OF TIME TO FILE REPLY BRIEF. (MS-02/13/97) FILED: 02/14/97. ACTION ON MOTION (7): GRANTED. BY CLERK. FILED 02/14/97. (EOD 02/14/97 BY LP) THE BRIEF IS DUE ON 03/26/97. 97-1002
8.	Appellee -- CONSENT MOTION TO EXTEND TIME TO FILE ITS BRIEF BY 14-DAYS. (MS-03/25/97) FILED: 03/25/97. ON CONSENT. ACTION ON MOTION (9): GRANTED. BY CLERK. FILED: 03/26/97. (EOD 03/26/97 BY LP) THE BRIEF IS DUE ON 04/09/97. 97-1002
10.	Appellant - CONSENT MOTION FOR 14-DAY ENLARGEMENT OF TIME TO FILE ITS REPLY BRIEF. (MS-04/10/97) FILED: 04/11/97. ON CONSENT. ACTION ON MOTION (11): GRANTED BY CLERK. FILED: 04/11/97. (EOD 04/11/97 BY LP) THE BRIEF IS DUE ON 05/13/97. 97-1002

DOCKET NUMBER	PROCEEDINGS
	HAGGAR APPAREL CO. [APPELLEE] - BRIEF OF APPELLEE, HAGGAR APPAREL CO. (MS-04/09/97). RECEIVED: 04/10/97. REJECTED: 04/24/97. CORRECTED BRIEF DUE: 05/08/97. [973555] (EOD 04/24/97 BY SPP) 97-1002
	HAGGAR APPAREL CO. [APPELLEE] - CORRECTED BRIEF OF APPELLEE, HAGGAR APPAREL CO. (MS-05/07/97). CORRECTED BRIEF RECEIVED: 05/07/97. FILED: 04/09/97. [973555] (EOD 05/12/97 BY JLA) 97-1002
	US [APPELLANT] - REPLY BRIEF FOR APPELLANT, THE UNITED STATES (MS-05/08/97). FILED: 05/08/97. [973746] (EOD 05/21/97 BY SPP) 97-1002
	US [APPELLANT] - JOINT APPENDIX (MS-05/15/97). FILED: 05/15/97. (973747) (EOD 05/21/97 BY SPP) 97-1002
	AFFIRMED. PRECEDENTIAL OPINION BY: J. RICH. JUDGMENT ENTERED: 10/22/97. COSTS AGAINST APPELLANT. (EOD 10/22/97 BY KSH) 97-1002

DOCKET NUMBER	PROCEEDINGS
13.	Appellant - MOTION FOR STAY OF MANDATE AND TO EXTEND TIME TO FILE A PETITION FOR REHEARING WITH OR WITHOUT A SUGGESTION FOR REHEARING EN BANC. (MS-11/24/97) FILED: 11/25/97. ACTION ON MOTION (14): GRANTED. REHEARING WITH OR WITHOUT SUGGESTION IS DUE JAUARY 7, 1998. BY MERITS PANEL. FILED: 12/02/97. (EOD 12/02/97 BY LP) 97-1002
	MANDATE ISSUED TO THE CIT: 12/15/97. (EOD 12/15/97 BY JCW) 97-1002
	DECEMBER 19, 1997 15. The mandate having been issued in error, it is ORDERED that the mandate be, and the same hereby is, RECALLED. cod by ksh on 12/19/97. 97-1002
	APPELLANT - COMBINED PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC (MS-01/07/98) FILED: 01/07/98 PETITION CIRCULATED: 01/09/98 SUGGESTION CIRCULATED: 01/22/98 RESPONSE REQUESTED FROM: APPELLEE (HAGGAR APPAREL CORP.) RESPONSE DUE: 02/09/98 RESPONSE FILED: 02/09/98 RESPONSE CIRCULATED: 02/09/98 PETITION/SUGGESTION: DENIED/ DECLINED ON 02/20/98. (EOD 02/20/98 BY ANT) 97-1002

DOCKET NUMBER	PROCEEDINGS
	MANDATE ISSUED TO THE CIT: 02/27/98. (EOD 02/27/98 BY LRP) 97-1002
	PETITION FOR WRIT OF CERTIORARI FILED 06/18/98, SUPREME COURT 1: 97-2044. (EOD 06/25/98 BY JW) 97-1002
	PETITION FOR WRIT OF CERTIORARI FILED 06/18/98, SUPREME COURT 1: 97-2044. CERT. GRANTED ON 09/29/98. (EOD 10/09/98 BY JW) 97-1002

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UNITED STATES COURT OF
INTERNATIONAL TRADE

Docket No. 93-06-00343

HAGGAR APPAREL COMPANY, PLAINTIFF

v.

UNITED STATES, DEFENDANT

COMPLAINT

COMES NOW Haggar Apparel Company, plaintiff in the above-styled cause, by and through its undersigned attorneys, and alleges as follows:

1. This is a civil action contesting the denial of a protest by the United States Customs Service ("Customs").

2. Jurisdiction over this action is vested in this Court by 28 U.S.C. §1581(a).

3. Plaintiff is the real party in interest in this action and is the proper party plaintiff since it (i) filed the protest which is the subject of this action, (ii) is the immediate parent company of the importer, Corsicana Company, (iii) is the party which paid the duties on behalf of the importer of record, (iv) was the owner of the imported merchandise, (v) is the party which paid for the imported merchandise from the foreign assembler, Haggermex, S.A. de C.V., plaintiff's second-tier subsidiary, and (vi) is the party which owned and

exported the fabric components from which the imported merchandise was made. Plaintiff has standing to sue under 28 U.S.C. §2631(a).

4. The protest which underlies this action was timely filed.

5. All liquidated duties have been paid.

6. The merchandise at issue certain men's trousers (hereinafter "trousers"), either 100 percent woven cotton or 60 percent cotton and 40 percent polyester, assembled in Mexico by plaintiff's second-tier subsidiary, Haggarmex, S.A. de C.V.

7. The decision contested in this action is the assessment of duty by Customs at the rate of 16.5 percent ad valorem under TSUS item 381.6240, and at the rate of 17.7 percent ad valorem under HTSUS subheading 6203.42.40, depending upon the date of entry, on values for the imported trousers which included the values or costs of the cut-to-shape fabric components of the imported merchandise.

8. Plaintiff claims than in assessing duty on the subject merchandise, Customs should have deducted the cost or value of all cu-to-shape fabric components under the provisions of TSUS item 807.000, or HTSUS subheading 9802.00.80, depending on the date of entry.

9. The imported trousers were assembled abroad in whole or in part of fabricated components, the product of the United States.

10. The cut-to-shape fabric components were exported from the United States in condition ready for assembly without further fabrication.

11. The cut-to-shape fabric components did not lose their physical identities in the imported merchandise by change in form, shape or otherwise.

12. The cut-to-shape fabric components were not advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.

13. Customs allowed TSUS item 807.00 or HTSUS subheading 9802.00.80 treatment on the subject entries for the United States fabricated components other than the cut-to-shape fabric components.

14. The fabric used to make fabric components for the trousers was made in the United States.

15. The fabric was cut to shape in the United States by Haggar at its plant in Weslaco, Texas.

16. Fabric which is cut to shape in the United States constitutes a fabricated component, the product of the United States, which qualifies as a deductible component under TSUS item 807.00 and HTSUS subheading 9802.00.80.

17. The fabric components, along with other components fabricated in the United States, such as buttons, thread, zippers and other trim items, were exported to Mexico.

18. These components were assembled into trousers by sewing without further fabrication in Mexico.

19. In Mexico, the sewn trousers were pressed, ovenbaked, washed, repressed and packaged for shipment to the United States.

20. The ovenbaking involved inserting the trousers into an oven at 300 to 325 degrees for approximately 10 to 25 minutes depending on the thickness of the fabric. The heat of the oven expels a molecule of water from the prepolymer in the fabric which cross links the cellulose fibers of the fabric.

21. Ovenbaking is an operation incidental to the assembly of the trousers.

22. The effect of ovenbaking is the same as the effect of pressing, which is incidental to assembly. 19 C.F.R. §10.16(b)(7).

23. The effect of ovenbaking is to create a smoothness to the garment and prevent wrinkling.

24. Customs has previously allowed TSUS item 807.00 treatment for articles moved through a hot oven. See HQ 063786 dated June 10, 1980; HQ 058070 dated February 7, 1978.

WHEREFORE, Plaintiff demands judgment: (1) holding that the U.S. origin fabric components of the subject merchandise are properly eligible for an allowance in duty under TSUS item 807.00 and HTSUS subheading 9802.00.80 and (2) ordering the district director of Customs to reliquidate the entries in issue with a duty allowance for the value of the United States origin fabric components under TSUS item 807.00 or HTSUS subheading 9802.00.80.

Respectfully submitted,

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By: /s/ BETH C. RING
BETH C. RING

Dated: New York, New York
July 21, 1993

CERTIFICATE OF SERVICE

Beth C. Ring certifies that I am an attorney with Sandler, Travis & Rosenberg, P.A., 5200 Blue Lagoon Drive, Miami, Florida 33126, and that on July 21, 1993, on behalf of plaintiff herein, the annexed papers were served by first class mail, postage prepaid upon:

Joseph I. Leibman, Esquire
Assistant Attorney General
Dept. of Justice, Civil Division
International Trade Field Office
Commercial Litigation Branch
26 Federal Plaza
New York, New York 10278

attorney for defendant herein.

/s/ BETH C. RING
BETH C. RING

UNITED STATES COURT OF
INTERNATIONAL TRADE

Court No. 93-06-00343
(Complaint File)

HAGGAR APPAREL COMPANY, PLAINTIFF

v.

UNITED STATES, DEFENDANT

ANSWER

Pursuant to Rule 7(a) of the Rules of the United States Court of International Trade, the United States, defendant, responds to the allegations of plaintiff's complaint as follows:

1. Admits.
2. Admits.
3. Admits.
4. Admits.
5. Admits.
6. Admits.
7. Admits.

8. Admits this is plaintiff's claim, but denies its validity.

9. Admits, as to the portion of the garments that were granted 807.00, TSUS, or 9802.00.80, HTSUS, treatment; denies the allegations of this paragraph for lack of knowledge or information sufficient to form a belief as to the truth thereof, with regard to the remaining components of the imported garments.

10. Denies the allegations of this paragraph for lack of knowledge or information sufficient to form a belief as to the truth thereof.

11. Denies the allegations of this paragraph for lack of knowledge or information sufficient to form a belief as to the truth thereof.

12. Denies.

13. Denies the allegations of this paragraph for lack of knowledge or information sufficient to form a belief as to the truth thereof.

14. Denies the allegations of this paragraph for lack of knowledge or information sufficient to form a belief as to the truth thereof.

15. Denies the allegations of this paragraph for lack of knowledge or information sufficient to form a belief as to the truth thereof.

16. Denies.

17. Denies the allegations of this paragraph for lack of knowledge or information sufficient to form a belief as to the truth thereof.

18. Denies the allegations of this paragraph for lack of knowledge or information sufficient to form a belief as to the truth thereof.

19. Admits, but avers that this is an overly simplistic description of the Mexican operations.

20. Denies the allegations of this paragraph for lack of knowledge or information sufficient to form a belief as to the truth thereof.

21. Denies.

22. Denies.

23. Admits, but avers that this description is overly simplistic.

24. Admits, but avers that those operations and allowances are not at all comparable to the operations that were performed upon the importations; further avers that the rulings cited involved merchandise and operations that are completely different than those involved in this case; further avers that Customs has previously disallowed item 807.00, TSUS, and/or subheading 9802.00.80 treatment for operations similar to those involved here that were performed upon textile goods, see, *e.g.*, HRL 027763 of September 13, 1973, 554436 of August 11, 1988.

WHEREFORE, defendant respectfully requests that judgment be entered dismissing this action, overruling plaintiff's claim, sustaining the decision of the appropriate customs official and the assessment of duty thereunder and granting defendant such other and further relief as may be just and appropriate.

FRANK W. HUNGER
Assistant Attorney General

/s/ Illegible
JOSEPH I. LIEBMAN
Attorney in Charge
International Trade Field Office

/s/ Illegible
SAUL DAVIS
Senior Trial Counsel
Dept. of Justice, Civil Division
Commercial Litigation Branch
26 Federal Plaza
New York, New York 10278
Attorneys for Defendant
Tel. No. (212) 264-9230 or 3485

CERTIFICATE OF SERVICE BY MAIL

SAUL DAVIS certifies that I am a trial attorney in the office of the Assistant Attorney General, Civil Division, Commercial Litigation Branch, International Trade Field Office, with offices located at 26 Federal Plaza, New York, NY 10278, and that on October 23, 1993, on behalf of the United States, defendant herein, I caused the annexed papers to be served upon:

Beth C. Ring, Esq.
Sandler, Travis & Rosenberg, P.A.
5200 Blue Lagoon Drive
Miami, Florida 33126-2022

the attorney(s) for the plaintiff herein, by depositing a copy thereof in a United States mail receptacle, properly enclosed in a securely closed envelope, duly franked or postage prepaid, addressed to said attorney(s) as above indicated.

/s/ Illegible

THE UNITED STATES COURT
OF INTERNATIONAL TRADE

Court No. 93-06-00343

HAGGAR APPAREL COMPANY, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

BEFORE: HON. DOMINICK L. DiCARLO, Chief Judge

PRE-TRIAL ORDER

NOW COME THE PARTIES, Haggar Apparel Company and the United States and set forth the following pursuant to the Court's instructions:

I.

STIPULATED FACTS

1. Jurisdiction over this action is vested in this Court by 28 U.S.C. §1581(a).

2. Haggar Apparel Company (hereinafter referred to as "Haggar") is the primary operating subsidiary of Haggar Corporation, a publicly traded corporation. Both Haggar Corp. and Haggar Apparel Company are incorporated in Nevada.

3. Haggar designs, manufactures, imports, and markets directly to retailers throughout the United States casual and dress men's apparel products including slacks, shorts, suits, sportcoats, and shirts. Products are offered in a wide variety of styles, fabrics, colors, and sizes. *Pl. Exh. 4* (Haggar's SEC Form 10-K).

4. Haggar's products are sold through approximately 7,000 retail stores operated by its customers, which include major department stores, and mass market retailers.

5. Haggar is the real party in interest in this action and is the proper party plaintiff since Haggar (i) filed the protest which is the subject of this action, (ii) is the immediate parent company of the importer, Corsicana Company, (iii) is the party which paid the duties on behalf of the importer of record, (iv) was the owner of the imported merchandise, (v) is the party which paid for the imported merchandise from the foreign assembler, Haggarmex, S.A. de C.V. (hereinafter referred to as "Haggarmex"), plaintiff's second-tier subsidiary, and (vi) is the party which owned and exported the fabric components from which the imported merchandise was made. Plaintiff has standing to sue under 28 U.S.C. §2631(a).

6. The protest which underlies this action was timely filed.

7. All liquidated duties have been paid.

8. The summons filed in this action contains accurate information.

9. The merchandise at issue is certain men's trousers (hereinafter "trousers"), of 60 percent cotton and 40 percent polyester, assembled in Mexico by Haggarmex.

10. Haggar is well-known for its use of "performance fabrics" that maintain a fresh, neat appearance. *Pl. Exh. 4.*

11. The decision contested in this action is the assessment of duty by Customs at the rate of 16.5 percent ad valorem under item 381.62.40, Tariff Schedules of the United States ("TSUS") and at the rate of 17.7 percent ad valorem under subheading 6203.42.40, Harmonized Tariff Schedules of the United States ("HTSUS") depending upon the date of entry, on values for the imported trousers which included the values or costs of the cut-to-shape fabric components of the imported merchandise.

12. Cotton fiber has historically been the dominant fiber used in wearing apparel in the United States. Beginning in the late 1940's, resin treatments were introduced for 100% cotton fabric, to improve certain performance properties of the apparel, including reduction of tendency to wrinkle, and increased ability to unwrinkle during wearing and after laundering. These treatments became popular, especially in casual wear trousers and men's dress shirts.

13. The resin-treated wrinkle resistant garments described above were offered to the public under a variety of descriptive names, including wash and wear, drip dry, easy care.

14. The term "wrinkle" means the undesirable mussiness or puckering, which may occur in a garment when it is worn or laundered. Crease means the desirable sharp folded pleat, which is often inserted in certain types of fabric for purposes of styling.

15. Conventional wash and wear cottons were basically unsuited for use of garments which required deliberate creases or pleats.

16. Beginning in the 1950's, polyester fibers began to be marketed and promoted. These fibers were also blended with cotton. These blended fibers had performance advantages, including the ability to impart creases which would persist to some extent after wearing and laundering, and reduction of puckering in seams.

17. These features have been generally referred to as durable press. After wearing and after washing, flat areas remain flat, seams remain smooth and deliberate creases and pleats remain sharp. These properties are achieved on cotton apparel by applying a resin (reactant) to cross link the cellulose molecules. These performance characteristics are generally imparted successfully by the approved use of 100% synthetic fabric, pre-cure of blended fabrics and post-cure of blended fabrics.

18. If Haggar seeks to obtain a garment that will perform in a certain manner regarding surface flatness, crease retention and seam flatness, it will use either pre-cured, post-cured or all synthetic fabric.

19. The men's woven trousers involved in this action were part of a merchandising line referred to as "Presstige," whose products have certain performance characteristics. These characteristics were primarily crease retention, seam flatness, and surface flatness. The particular garment at issue is known by Haggar as model number 245.

20. The term: "post-cured" means a fabric that has been chemically treated (here, impregnated with re-

sins) in a textile finishing mill, but has not been cured by a specific heat process until after the completion of all assembly. During the period in question, Haggar effected post-curing through the use of a curing oven. "Pre-cured" means a fabric that has been chemically treated and cured at the mill, or prior to shipment to the customer who will cut it to shape and/or subsequently assemble the fabricated components. No post-cure ovenbaking occurs with garments made from this fabric, but there is pressing. "Pure finish" means a fabric that will not have been treated by chemicals, for a wrinkle-free appearance, nor will it be cured. If the resulting garment is made from pure finish fabrics of 100% cotton it will not have the surface flatness, crease resistance and seam resistance that is mandated by the Presstige line performance requirements.

21. The apparel industry has standards for crease retention, seam flatness, and surface flatness on a scale between 0 to 5. Haggar's identification of Presstige as a performance product, implied that it achieved ratings for surface flatness and crease retention of 3 or better.

22. The routine tests performed on both ovenbaked and non-ovenbaked garments are:

a. Surface Flatness—garment is washed three times, and allowed to condition for four hours. Garment is compared to a standard replica, to see how flat it is, or if it's all wrinkled.

b. Crease Retention—after washing and conditioning the crease in the garment is compared to a standard—does it remain, does it open up, and/or to what degree does it flatten out.

c. Seam Flatness—after washing and conditioning, the garment is examined for the amount of puckering on the seam, as compared to a standard.

23. During the period of time in issue, the Presstige line category of clothes encompassed basically three different types or ranges of fabric; a completely synthetic fabric type 0172; a pre-cured fabric type 5850/0585 and a post-cured fabric type 2010, the product at issue here.

24. Performance characteristics are imparted by the type of fabric involved, pressing techniques, and the oven-curing process. Some regulated heat process is necessary. The pressing varies by temperature and moisture application, depending upon the desired result and upon the fabric. To achieve greater crease retention and greater surface flatness, more heat is generally applied and more moisture. Unregulated heat or improper heat application can cause under or over curing, which can lead to rejection of the garment.

25. Curing positively affects the crease retention, seam and surface flatness of the poly/cotton blend. It negatively affects flex abrasion, tear strength, seam strength, and other factors.

26. The curing cycle at issue is approximately 12-15 minutes @ generally between 290F and 320F. The factory was instructed to maintain that temperature and to correct it if it went above or below the standard. If the temperature was not corrected, the garment would be over cured and under cured. Under curing would negatively affect the surface flatness and crease retention and could affect seam flatness. If over cured, tear, tensile and seam strengths, and flex abrasion

would be negatively affected. Therefore, it was imperative that the plant properly monitor the curing process. Over or under curing can also occur if times in the curing oven are more or less than the standard.

27. Post cured and pre-cured garments will perform the same and give the fabric the same quality.

28. Polyester or synthetic had the highest performance ratings, but was not considered desirable for many styles or models of pants.

29. Some weights of fabric perform better pre-cured and some post-cured.

30. Because chemicals are used in precured and postcured fabric, a stronger initial fabric must be used in order to compensate for the degradation of the fabric caused by the chemicals and the curing process.

31. Post-cured garments have been rejected for failure to comport with the ratings for three routine tests performed by Haggar on its garments and fabrics.

32. Presstige line is a performance level for wrinkle-resistant garments; therefore, the garments can be made with either a precured fabric, fabric that is chemically treated and made into the garment and then subjected to post curing, or an all synthetic fabric. There are no pure finish 100% cotton garments used in Presstige line. Any 100% cotton pure finish garments also had the routine tests performed on them, but the requirements were not the same as for Presstige, since pure finish 100% cotton garments are "very wrinkled" which is desirable for that product. The testing on pure finish was for information only as the desired wrinkles would make the three routine tests less significant since there would be no or minimal seam and surface flatness and crease retention—they are not desired in pure

finish garments. Pure finish garments would include jeans, and cotton casual pants.

33. The first fabric range for the Presstige model 245, known as fabric type no. 5850, was made with a fabric 60% combed cotton and 40% dacron polyester, and carried the lot model number 1111-5850/0585**-245. Fabric type 5850/0585 was a pre-cured, non-ovenbaked product. The second fabric type, 0172, was made with 50% dacron polyester, 40% avril rayon, and 10% orlon acrylic, and carried the lot model number 1111-0172**-245. Fabric type 0172 was a non-ovenbaked product. Third, the model in question, fabric type 2010, a post-cured, ovenbaked product, carried the lot model number 1111-2010**-245. All of these models involved the same assembly steps.

34. The U.S. fabric components on the two non-ovenbaked models, lot model numbers 1111-5850/0585**-245 and 1111-0172**-245, were granted 807 allowances by Customs.

35. The fifth through eighth digit in the lot model number denotes fabric type which determines the model to be baked. The lot model number is deciphered as follows:

11 -	digits one & two	- Haggar division.
11 -	digits three & four	- product code. (pant, coat, etc.)
2010 -	digits five thru eight	- fabric type
XX00 -	digits nine & ten	- color (basically irrelevant for production.)
245 -	digits eleven thru thirteen	- model (primarily denotes production processes.)

36. All of these pants were designated by the model number 245. This involves a men's fit, straight leg silhouette, belted, regular belt loops, 1/4 top pockets, 2 reece back pockets and 24 ligne buttons.

37. The different fabric types or ranges for Prestige model 245 described above had no effect on the assembly steps. Assembly of the product is the same whether it is oven baked or not. The only exception was that at the end of the assembly and after pressing, the ovenbaked model was loaded and unloaded to an oven conveyor for curing in the oven; this was mandated by Haggar's product standards. One can have an assembled pair of pants without the oven bake process or without pressing.

38. One can have a fully assembled pair of pants without the pressing process.

39. The 5850 style sold by Haggar for a price of $13.90 npt with suggested retail of $30.00. The 0172 style was sold by Haggar for a price of $16.00 npt with a suggested retail of $32.50. The model carrying the fabric style in question, 2010, used a natural blend duck cloth, with a fabric content of 60% combed cotton and 40% fortrel polyester. The price was $13.00 npt with a suggested retail of $30.00. *Pl. Exh. 16.*

40. The cost or type of fabric—*e.g.*, if treated for oven baking or not—makes no difference in the assembly process.

41. In non-ovenbaked products, if the crease is pressed incorrectly, the garment is corrected at another Haggar factory and sold as a first quality. However, for an oven baked product, once it is properly cured, any error in the crease cannot be rectified, and the resulting product and cannot be sold as first quality—they

become seconds or "assortments." Seconds or assortments which are caused by improper curing are not sold for any less than seconds or assortments which are caused by the assembly process.

42. In this case, the post-curing process used on the 2010s was achieved by pressing and ovenbaking. Haggar had owned ovens for 25 years, and the use of ovens was an efficient way to impart some of the characteristics it needed.

43. The imported trousers were assembled abroad in whole or in part of fabricated components, the product of the United States. *Pl. Exhs. 2 & 9.*

44. The cut-to-shape fabric components were exported from the United States in condition ready for assembly without further fabrication.

45. The cut-to-shape fabric components did not lose their physical identities in the imported merchandise by change in form, shape or otherwise.

46. Customs allowed TSUS item 807.00 or HTSUS subheading 9802.00.80 treatment on the subject entries for the United States fabricated components other than the cut-to-shape fabric components.

47. The fabric used to make fabric components for the trousers at issue was made in the United States. The fabric was purchased by Haggar in resin-treated form.

48. The uncured, resin-treated fabric was cut to shape in the United States by Haggar at its plant in Weslaco, Texas.

49. The actual cutting operations, which cut the bolts of fabric into the components used to assemble the

imported Presstige pants, takes 1.8 seconds for all of the components for each pair of pants.

50. The uncured, resin-treated fabric components, along with other components fabricated in the United States, such as buttons, thread, zippers and other trim items, were exported to Mexico for assembly.

51. These components were assembled into trousers by sewing without further fabrication in Mexico.

52. In Mexico, the trousers were pressed, oven-baked, and packaged for shipment to the United States.

53. The ovenbaking at issue involved inserting the trousers into a curing oven at 290 to 320 degrees for approximately 12 to 15 minutes. *Pl. Exh. 8* (Schedule 9).

54. No additional resins or other chemicals were added to the fabric components at the assembly plant in Mexico.

55. The effect of ovenbaking is to create crease retention and greater surface and seam flatness in the garment, and prevent wrinkling.

56. The engineering standards for all three models listed above were the same. The oven baking process is listed in the engineering standards as an option. *Pl. Exh. 7* (Schedule 6 page 2 of the pages entitled "Standard no. 999.020"). This option means that ovenbaking is used only in the post-cure process; if fabric required post-curing, ovenbaking was mandatory. In addition, the same sewing specification manual (*Pl. Exh. 5* (Schedule 4)) is used for all three models.

57. The labor for the loading and unloading to the oven conveyor adds a time of approximately .6 minutes per garment. As shown in *Pl. Exh. 8* (Schedule 9), the

actual oven time involved in the curing was 12 to 15 minutes, with 800 garments being treated per hour. Each of the garments in issue require curing for 12-15 minutes at the appropriate temperature.

II.

EXHIBITS

Plaintiff's exhibits and objections and defendant's exhibits and objections were previously filed with this Court.

AGREED AND STIPULATED:

FRANK W. HUNGER
Assistant Attorney General

By: /s/ JOSEPH I. LIEBMAN
JOSEPH I. LIEBMAN
Attorney in Charge
International Trade Field Office

/s/ EDWARD M. JOFFEE
EDWARD M. JOFFE
ARTHUR K. PURCELL
Sandler, Travis & Rosenberg, P.A.
Attorneys for Plaintiff
5200 Blue Lagoon Drive
Miami, Florida 33126
(305) 267-9200

/S/ SAUL DAVIS
SAUL DAVIS
Dept. of Justice, Civil Division
Commercial Litigation Branch
26 Federal Plaza, Rm. 346
New York, NY 10278
Attorneys for Defendant
(212) 264-9230 or 3584

Dated: _____, 1995

SO ORDERED:

_____
DOMINICK L. DICARLO,
Chief Judge

THE UNITED STATES COURT
OF INTERNATIONAL TRADE

Court No. 93-06-00343

HAGGAR APPAREL COMPANY, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

[Filed: March 13, 1995]

JOINT STIPULATION

BEFORE: HON. DOMINICK L. DICARLO, CHIEF JUDGE

By agreement of counsel and pursuant to the direction of the Court, the parties have agreed to stipulate to the following cost and time data contained in the attached schedules. This information is derived from trial exhibits 3, 7, 8, 9, and 10.

Respectfully submitted,

SANDLER, TRAVIS & ROSENBERG, P.A.
Attorneys for Plaintiff
Haggar Appeal Company
The Waterford – Suite 600
5200 Blue Lagoon Drive
Miami, Florida 33126

By: /s/ EDWARD M. JOFFE
EDWARD M. JOFFE

Date: March 13, 1995

DEPARTMENT OF JUSTICE
Civil Litigation Branch, Rm. 346
Attorneys for Defendant
The United States
26 Federal Plaza
New York, New York 10278

By: /s/ illegible
SAUL DAVIS

Date: 3/13/95

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

RATIOS - SELECTED STIPULATED COSTS AND TIMES BASED UPON EVIDENCE

	A	B	C	D	E	F	G
1	*Operation*	*Description*	*Operation Number*	*Cost including Overhead*	*Cost without overhead*	*Time*	*Time including 15 minutes for overbaking equipment*
2	Ovenbaking	loading and unloading	63,64	0.0260	0.0106	0.6173	15.6173
3	Total Operation	all	1 through 60	1.2300	0.5000	29.3237	44.3237
4	Prebaking	All operations before loading onto oven conveyer	1 through 62	1.0200	0.4146	24.4017	39.4017
5	Prebaking less pressing	All operations before baking except pressing	1 through 52 except for 42,50 and 51	0.9158	0.3723	21.9253	36.9253
6	Affected Components	2.80 -fabric cost and .28 cutting room labor cost	Information is contained in exhibit P-8	3.0800		N/A	
7	Assembly	Defined by Government as the joining of two solids	1,3,4,5(90%),7(99%), 8-11, 13(15%), 15-17, 19,21,22,24,25(97%), 26,27,29-33,35-38,39(90%),41,43-47	0.7600	0.3089	18.0620	
8	Non-Assembly	Operations other than those defined as assemby	All operations not included in numbers set out in assembly	0.4700	0.1911	11.2620	26.2620
9	S & H	Supply and Handling	6,14,20,23,28,34,40	0.0360	0.0146	0.8703	
10	Trim Operations	Trim inside and outside threads	48,49	0.0649	0.0264	1.5428	

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RATIOS - SELECTED STIPULATED COSTS AND TIMES BASED UPON EVIDENCE

	A	B	C	D	E	F	G
11	Pressing	Pressing	42,50,51	0.1042	0.0424	2.4764	
12	Pressing & Ovenbaking		42,50,51,53,54	0.1302	0.0529	3.0937	18.0940
13	Total Operation less overbaking			1.2040	0.4894	28.7084	

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HAGGAR - EQUIPMENT

Equipment	Cost	Ratio toTotal
Ovenbaking	$92,808	6.72%
Pressing	$430,000	31.15%
Ovenbaking & pressing	$522,808	37.87%
Total without ovenbaking	$1,287,724	93.28%
Non-assembly(overbaking, pressing, Reece buttonhole, YKK chop zip, inspection board and belt loop crimper)	$611,828	44.32%
Assembly -Difference beween non-assembly and total equipment	$768,704	55.68%
Ratio - Nonassembly/assembly		79.59%
Ratio - Overbake & pressing/assembly		68.01%
Ratio - Non-assembly/total		44.32%
Ratio - Ovenbaking & pressing/total		37.87%
Total	$1,380,532	100.00%

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THE UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: HON. DOMINICK L. DiCARLO, CHIEF JUDGE

HAGGAR APPAREL COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Court No. 93-06-00343**
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	
	)	

JOINT STIPULATION FOR REVISED SELECTED COSTS AND TIMES PURSUANT TO QUESTION 3A IN THE COURT'S DECEMBER 27, 1995 REQUEST

By agreement of counsel and pursuant to the direction of the Court, the parties have agreed to stipulate to the following revised selected costs and times.

Operation	Description	Operation Number	Cost Including Ovenbaking	Cost Without Overhead	Time	Time Including 15 Minutes For Ovenbaking Equipment
Revised Total Operation	All Except units 11 & 15	7-14, 21-60 6-14, 20-60	1.14247	.4644	27.2434	42.2434
Revised Prebaking	All operations before loading onto oven conveyor except units 11 & 15	7-14, 21-52	.93247	.3790	22.3214	37.3214
Revised Prebaking Less Pressing	All operations before baking except units 11 & 15 and pressing	7-14, 21-52 except for 42,50 & 51	.82827	.3368	19.845	34.845
Revised Assembly	Defined by Government as the joining of two solids except 11&15	7 (99%), 8-11, 13 (15%), 21,22, 24,25 (97%), 26,27,29,33, 35-38,39, (90%), 41, 43-47	.6844	.2782	16.2652	

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Haggar's agreement to these revised figures is not an agreement that the Government's argument for the use of these numbers is valid or appropriate.

Respectfully submitted,

EDWARD M. JOFFE
SANDLER, TRAVIS, ROSENBERG, P.A.
The Waterford, Suite 600
5200 Blue Lagoon Drive
Miami, Florida 33126
Attorneys for Plaintiff
Tel: (305) 267-9200

By: Edward M. Joffe

Date: January 25, 1995

FRANK W. HUNGER
Assistant Attorney General

JOSEPH I. LIEBMAN
Attorney in Charge
International Trade Field Office

By:

SAUL DAVIS
Dept. of Justice, Civil Division
Commercial Litigation Branch
26 Federal Plaza
New York, New York 10278
Attorneys for Defendant
Tel: 212/264-9230 or 3584

By: Saul Davis

Date: Jan 25 '95

SO ORDERED:

By :
HON. DOMINICK L. DICARLO, CHIEF JUDGE

D:\O~1\C:\WORDPERFECT\61040\12\JOINTSTP

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PROCEEDINGS

* * * * *

(212) 349-9692
TANKOOS REPORTING COMPANY
(516) 741-5235

PROCEEDINGS

[4]

THE COURT: Be seated.

THE CLERK: COURT NUMBER 93-06-00343, Haggar Apparel Company verus the United States.

Is counsel for Plaintiff ready?

MR. JOFFE: Yes, Your honor. My name Edward M. Joffe, for the Plaintiff, Haggar. This is Arthur Purcell and Gilbert Lee Sandler, also.

THE CLERK: Counsel for Plaintiff ready? Defendant, ready?

MR. DAVIS: Yes, Your Honor.

THE COURT: All right.

Counsel told me it would take two days for the trial? Is that correct?

MR. JOFFE: Your Honor, --

THE COURT: We have scheduled that time, two days, in any event.

MR. JOFFE: Your Honor, we may finish quicker, but I think that that – I would say one to two days.

MR. DAVIS: I Think that's an accurate assessment, Your Honor.

THE COURT: All right. What I'd like to do in this particular case, if I can determine what the disputed facts are in this particular case, is to have counsel argue the next day, after we complete the matter. See if we can

* * * * *

[43]

about one hundred per cent polyester, which inherently is a performance fabric, and it would meet the requirements without any processing.

The poly-rayon that we're talking about requires some hot head pressing, and that's how we achieved the performance.

Q Well, then, why – why would you offer products that are not all synthetic, then, for these performance traits?

A Consumer demand. Consumers demand cotton, and that's more to the casual side of the spectrum.

Q Now, you mentioned the second method, in terms of obtaining the performance attributes, and that's referred to as a "pre-cure"?

A As a pre-cured.

Q And, could you explain to the Court what is that?

A Yes. The resins are applied at the mill, in a flat state, when the fabric's in a flat state, and the heat treatment and the heat setting is applied at the mill.

Q And did you use a pre-cure fabric for pants that were included in the "Prestige" line?

A Several, yes.

Q And then you mentioned the third is the oven baked?

[50]

Once we start the process, in the factory, on the presses, then if there are, that process can continue. It can continue at a temperature of a hundred and seventy – as low as a hundred and seventy degrees, which we do get in tractor-trailers. And if there are creases in the pant, or winkles in the product, when we stack them and ship them, then in fact those wrinkles could become permanent and make the product useless.

Q Are there any economic consequences associated with oven baking in the United States afterwards? In terms of cost.

A We have, in our entire process, whether – in our history, whether we were manufacturing in the U.S. and baking in the U.S., or manufacturing in Mexico or the Dominican Republic, we always bake at the end of the

process, for the reasons I just mentioned. It's more efficient, manufacturing-wise, and it's also necessary.

(Pause)

Q Let me ask you about the sale of seconds or irregulars.

A Yes.

Q Are you familiar with Haggar's practices in the '88-'89 period?

A Definitely.

Q Were there – were there irregular – was

A It will not be in a flat state and it will not have a crease.

Q Will it be all wrinkled up?

A Well, relatively. I mean –

Q Now, let's say you had pressing on the pure finish garment, and then you had the entire procss properly performed on the post-cured garment, and then the consumer would wash it once or twice or three tims.

Would there be an observable difference between the two garments?

A Yes.

Q What would the observable difference be?

A The surface flatness and the crease retention would be much greater in the permanent press, or the post-cured garment.

Q Does the post-curring process permit the garment to have a relatively permanent performance for crease retention and surface flatness?

A Yes.

Q Is that a desirable requirement to, for Haggar?

A In some garments – in some garments, especially cotton and cotton-blend garments. It's very desireable.

Q Well, where it's not desirable, do you actually use a resin and a post-cure process on your garments, where it's not desirable?

A Where it's not desirable, we use pure finish fabrics.

Q Does Haggar advertise its garments that have been post-cured?

A During the period of time in question?
Q Yes.

A Yes.

Q Did that advertising include emphasis to the consumer on performance regarding the surface flatness –

A Yes.

Q -- and crease retention?

A Yes, it did.

Q Why did you – well, withdrawn.

How extensive was that advertising campaign?

A Relatively extensive. It was a significant portion of our advertising for that, for those years.

Q Well, why did you – why would you expend such monies on perforamce characteristics that are imparted by the curing process?

A Because they're desirable to the consumer. Easy care is desirable.

Q And if it's desirable to the consumer, it is desirable to Haggar?

A Yes.

Q Is that an important factor in marketing these articles?

A It's a significant factor.

Q Did Haggar perform – withdrawn.

Now, you had mentioned earlier that Haggar conducted or was involved with research and development on the resin application, in conjunction with the manufacturer.

Why was Haggar involved in that type of research and development?

A Because we are involved in the development of all facbrics, not just resin-finish fabrics. We're involved in the development of every fabric that we run in our product lines.

Q Well, why is that?

A It's a styling issue and it's a quality issue.

MR. JOFFE: Your Honor, I have a relevancy objection to this line of questioning. These are hypothetical and speculative. They're not pointing to the products in issue.

MR. DAVIS: It's specifically what I asked about.

THE COURT: I Think what he's referring to are any of these products –

required hot head pressing.

Q But is that pressing considered to be a curing process, such as the post-curing that's involved here?

A It's a heat-setting process.

Q Okay, now, you also stated that there's a post-cure fabric and there's a pre-cure fabric that's used for the "Prestige" pants.

Is that correct?

A Yes.

Q Well, why don't you do pre-curing on all the pants, including the duck cloth?

A There are a multitude of factors, including the capacity of the fabric mills to suppy resin-treated fabrics. Some – some fabrics perform better under one process, and others perform better under another process.

But, there are capacity issues, both on the mill side and on our side that are involved in that.

Q Well, my understanding is, is that the mill, itself, just impregnates the fabrics with the resin.

Is that correct?

A That is correct.

Q So, that's going to be done no matter what, whether it's pre-cure or post-cure process. It's going to have to impregnate the fabric –

A It's a different process –

Q – with the resin.

A – if it's pre-cured, it's a different process, at the mill level, than if it's post-cured.

Q Does the mill do the finishing on a pre-cured fabric?

A Yes, they do. They do the heat-setting.

Q All right, they do the heat-setting.

A Right.

Q All right.

Now, isn't it correct to state that on a duck cloth, because of the nature of the fabric, it is more efficient, and you get better performance characteristics if it's done by a post-cure, rather than a pre-cure method? Because of the nature of the fabric?

A On the duck cloth fabric?

Q Yes.

A Itself?

(Pause)

We've done the duck cloth, both pre-cured, and post-cured, and still met the requirements that we're talking about here. Now, we did not do it during the period of time in question.

THE COURT: Is there a reason for that?

THE WITNESS: Is there a reason for that?

THE COURT: Was there a reason for not doing it at the time in question, as distinguished from some other time where you do do it?

THE WITNESS: The – I, I don't think there is a specific reason for it.

THE COURT: So, one is just as efficient as the other? Even at that time, the time in question?

THE WITNESS: I want to be very correct on this.

We have pre-cured our duck cloth fabric, and advertised it as a performance product, meaning that it exceeded the industry-accepted standards. But, we are able to achieve a better performance with the post-cured product.

THE COURT: So, then, it's preferable to use the post-cured product?

THE WITNESS: If that's what we're looking for.

THE COURT: Okay, something in excess of a three?

THE WITNESS: Yes, correct.

THE COURT: Well, both met the three, the post-cured would be greater than the pre-cured?

THE WITNESS: Would get us closer to a four, that's correct.

THE COURT: So, you would be producing a

* * * * *

THE WITNESS: That's correct.

BY MR. DAVIS:

Q Now, if you only used the press, in order to complete the curring process, how long would that take?

A It's –

Q In actual fact.

A I, I can get the numbers for you. I don't have them right here, but it's not twelve minutes.

THE COURT: Approximately how long does the pressing operation now take, without the oven part of it?

THE WITNESS: It's about sixty, eight seconds, something like that.

THE COURT: And you're saying, then, that –

THE WITNESS: It could take two or three times –

THE COURT: -- if they were to press it would be some time from double or triple that?

THE WITNESS: And that may be high. We, we have the exact numbers. I just haven't –

THE COURT: All right. Supply them, for the record, if it's important enough to get them.

BY MR. DAVIS:

Q Now, you also testified in the 245 Model you had a cotton-poly poplin.

Was that pre-cured or post-cured?

A Well, it could reflect anything in the process, from the raw materials forward.

Q Now, you testified earlier that one of the reasons that you post-cure at the factory is, rather than in the United States, is because that there can be some partial curing in transportation –

A Yes.

Q -- because of heat that's raised in the trucks or whatever you –

A Yes.

Q -- whatever is being used to transport the garments.

Is that correct?

That is correct.

Q Now, when you et the fabric from the factory, is that transported in the same, by the same means as the garments are?

A Yes.

Q When –

A A similar means.

Q Similar means – by truck or by rail, is that correct?

A Yes.

Q When you – when you send the rolls of fabric to your Weslaco cutting facility, in Texas, where the fabric is cut into the components that are being used to make the garments in issue, do you also ship by truck.

A Yes.

Q When the completed components, from Weslaco, are shipped to the Mexican assembly area, is that, are the components also shipped by truck?

A Yes.

Q And do those trucks, can those trucks get up to temperatures of a hundred and seventy-five degrees?

A Yes.

Q Why doesn't that affect the garments, the performance of the garments?

A Because – because we have not started the heating, the curring process – we start the heating, the curing process at about three hundred degrees on the presses.

Q Okay, so what you're saying then is that a post-cured operation is probably more preferable to a pre-cure

because once you start the heating process, then simple transportation can affect the fabric, if there are wrinkles or, of the fabric in transit.

Is that correct?

A The last part is correct. I don't – the first part about one being preferable to the other, it depends on what you're – what you're desiring.

Q All right, but in the – all right. Let's take the post-cured garments, then.

So, you're saying then that once, until you've gotten to three hundred degrees on the garment, the curring process hasn't started.

Is that correct?

A That is correct.

Q Okay, so then, in fact, the – you said that the presses, in fact, then, begin the curring process.

Is that correct?

A That is that correct?

Q And then –

A It's inadvertent.

Q All right. And the pressing process is after the completion of all assembly on the pants.

A That's correct.

Q Is that correct?

So, then, the oven curing process is the completion of the major portion of curing, after all assembly has been completed.

Is that correct?

A That's correct.

Q Do you need the oven curing, in the post cure product, to do any assembly?

THE COURT: It's already stipulated assembly

[95]

MR. DAVIS: All right. I'll save – I'll save that.

THE COURT: All right, fine.

MR. JOFFE: We have a video, Your Honor.

THE COURT: Okay.

(Pause)

BY MR. DAVIS:

Q Now, when you a defect that's done in a sewing operation, can you open up the seam and then correct that defect?

A Yes, if that – yes.

Q If you properly pressed the pants and got the surface flatness that you sought and the crease that you sought – well, withdrawn.

If the pants was improperly pressed, so that there were wrinkles in the pants, or the crease was off-center, or the crease was not directly in the center portion of the pants, but was to the side, and it was properly cured by the oven baking process after that, could you correct that, those defects?

A The examples you gave are not correctable.

(Pause)

MR. DAVIS: Your Honor, could we take –

THE COURT: A break?

MR. DAVIS: -- a break now, because what I'd

AFTERNOON SESSION

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Whereupon,

FRANK BRACKEN

the witness on the stand at the time of the recess, resumed the witness stand, and upon examination testified further as follows:

CROSS-EXAMINATION (RESUMED)

BY MR. DAVIS:

Q Did Haggar manufacture "Prestige" pants in the United States at any time?

THE COURT: Excuse me. I didn't hear it, counsel.

MR. DAVIS: I'm sorry. I'll repeat the question.

BY MR. DAVIS:

Q Did Haggar at any time manufacture "Prestige" pants that were subjected to a post-cure process in the United States.

A Yes, we did.

Q So, then, Haggar would have had ovens and presses in the United States.

Is that correct?

A Yes.

Q Was that also during the period '88'-'89-'90?

[98]

A I'd have to check my facts, but – I'd have to check my facts, but I'm fairly comfortable that we did.

THE COURT: Was the assembly process also done in the United States, in those cases?

THE WITNESS: Yes, but I don't know if it was on this particular product, and this particular process, during those two years.

BY MR. DAVIS:

Q Now, once the garment, this, let's say the garments in issue, are fully assembled in Mexico, could they be shipped to the United States for pressing and oven baking, using the same presses and oven baking equipment that was in the United States?

A They could be, but it would substantially add to our labor cost.

Q How would it add to your labor cost?

A Because of the pressing. That's one of the major reasons we assemble in Mexico.

Q Because the pressing – the pressing labor costs are less expensive in Mexico than it is in the United States?

A Substantially less.

(Pause)

Q Now, are you familiar with the term "under-curing"?

A Yes, I am.

* * * * *

[101]

THE COURT: I just want to make sure it wasn't a question of Miss Best having one or two years' experience and you having a great deal more, or vice versa. That's all.

THE WITNESS: Our experience is comparable.

THE COURT: Okay.

BY MR. DAVIS:

Q Is it correct to state that crease retention and surface flatness are very important to Haggar in manufacturing, advertising, and marketing these pants, becaues they are important to the consumer?

A That is correct.

THE COURT: I believe he's already answered that, counselor.

MR. DAVIS: Not on this side, Your Honor.

THE COURT: Excuse me?

MR.DAVIS: There's a little – if you'll excuse the pun –

THE COURT: Nuance?

MR. DAVIS: -- "wrinkle," I was going to say.

THE COURT: Excuse me?

MR. DAVIS: If you'll excuse the pun, I was going to say there's a little wrinkle here.

THE COURT: A wrinkle? Let's hear the wrinkle. Go ahead.

[102]

THE WITNESS: That is correct.

THE COURT: I hope you're not going to judge this case on what you perceive to be wrinkles.

Go ahead.

[laughter]

MR. DAVIS: Sometimes, the wrinkles can be quite important.

THE COURT: Then, I –

MR. DAVIS: As in the "Prestige" line.

THE COURT: And you're to press on, and well see how important they're going to be. Because the mere fact that you find a wrinkle there and it's that far off, doesn't mean it's going to be dispositive of anything, but go ahead. Explore it fully, if you think it's important.

MR. DAVIS:

Q If consumers purchased pants that did not have proper crease retention or surface flatness, is it correct to state that they would return them for improper performance?

A Some percentage of them do.

Q Is it correct to state that Haggar is very strict regarding its standards and directions to manufacturing facilities in order to insure surface flatness and crease retention?

A That's correct.

[103]

(Pause)

Q During the period in question, has Haggar ever manufactured the merchandise in issue with pressing alone, without over baking?

A No.

Q Has Haggar ever sold these pants without oven baking, even if pressing was performed in accordance with Haggar's standards for pressing?

A "These pants" being?

Q The "Prestige" post-cured?

A No.

Q If Haggar had merely assembled these pants, without either the pressing or the oven baking, would Haggar have sold those pants as a "Prestige" line pants?

A No, we would not have.

Q Is it correct you would not have because they simiply would not have met Haggar's performance requirements.

A Well, we wouldn't sell any pant without pressing.

Q But, would it have met Haggar's performance requirements?

A No, it would not have.

Q Now, other than the standards for curing and pressing, are there also standards for the appearance and placement of the crease?

[104]

THE COURT: What was the last word, again?

MR. DAVIS: Appearance and placement of the crease.

A That is correct.

Q Is appearance and placement of the crease a function of the pressing techniques?

A Yes, it is.

(Pause)

Q Is it correct to state that the oven baking process is the final process that causes these pants, if everything else is done properly, to meet the design and quality assurance requirementsof Haggar for that pants to be sold as a "Prestige" pants?

A That's correct.

(Pause)

Q Now, let's assume you have two pair of pants. The exact, same fabric is used, identical fabric. Both are subjected to the 245, Model 245 assembly process.

Do you follow me?

A The fabric in question is the twenty-ten?

[105]

Q It's a twenty-ten, which is a duck cloth that has been --

A Correct.

Q -- impregnated with resins for post-curing. Both fabrics are subjected to the same assembly process, the Model 245 assembly process.

A Correct.

Q Is it correct to state that if one is properly cured and the other is not, the first will be sold as a first-quality "Prestige" pants, while the second would never be sold as a "Prestige" pants?

A I guess, in that scenario, if we still had the opportunity, in other wors, we would not do that deliberately. We would not fail to oven cure it.

Q But I'm saying it wasn't cured properly. You did oven cure it, but somehow the settings were improper --

A It was cured improperly?

Q It was cured improperly.

A It would be sold as a second.

Q All right. Now, in -- when garments are sold as a second, is it correct to state that Haggar discounts it

anywhere from twenty to twenty-five per cent, on a wholesale level, at Haggar's level?

A That's a good benchmark.

Q Is it correct, though?

[106]

A Well, it's not absolutely correct. It's a good benchmark. I mean, we -- sometime, it's what the market will bear, higher or lower.

Q And is it -- well, that was my next question.

Is it correct to state there are times that such seconds will be sold for even less than - -

A Correct.

Q -- for an even greater discount than the twenty to twenty-five per cent?

A Certainly, both, both extremes.

Q And is it correct to state that, at the retail level, in that scenario, the improperly cured pants would be sold by as much as a twenty-five to thirty per cent discount?

A Correct.

Q Is it correct to state that the, generally speaking, that Haggar's and the industry's markup for these types of garments range in the thirty to thirty-five per cent range?

A That's correct.

THE COURT: How are the seconds marketed? Label changes?

THE WITNESS: They're marked as irregulars, and disributed through other channels of distribution.

THE COURT: Are they labeled as "Prestige" irregulars?

[107]

THE WITNESS: In some cases, they would be labeled "Prestige" irregulars.

BY MR. DAVIS:

Q I thought you had testified just earlier that if the curing process is improper, --

A Well, --

Q -- they're not sold as "Prestige"

A If you're only talking about the curing process, but we have "Prestige" irregulars that are properly cured, but they're still irregulars for other reasons, because we have irregulars in every range of product that we run today.

THE COURT: We're just concentrating, now, on the curing process.

THE WITNESS: They would not be sold as a "Prestige" product.

THE COURT: Would it be sold as a Haggar product?

THE WITNESS: Yes, as Haggar.

BY MR. DAVIS:

Q But, if you do have, you can have irregulars in the "Prestige" line that are sold as "Prestige irregulars," but it doesn't involve the curing procss?

A That's right. That's correct.

[111]

MR. DAVIS: I didn't remember if he did. I wasn't sure about that, Your Honor. That's why I wanted to get him to --

THE COURT: All right, go ahead.

A Yes, I did.

Q All right, then, that's fine.

Now, is it correct to state that the actual sewing and assembly of the components that are in issue in this case completes the article into an article that's known as a pants.

A Correct.

Q However, the product, the "Prestige" pants that Haggar desires to sell, is not completed unless proper pressing and oven curing occurs.

A That's correct.

THE COURT: And we've gone over that three or four tims, already, I believe. That they do complete it -- that the the assembly is complete. The only thing that remains to be done is the curing. The curing is to put the crease in there, make it a permanent, and make it wringle, at least to a certain degree, wringle-proof. It has to go above a pont-three, I believe, in order to meet the standards of the Haggar "Prestige" slacks. I don't want to repeat the thing over again. I think we've covered it. So move on.

[112]

MR. DAVIS: I will, Your Honor.

BY MR. DAVIS:

Q Did Haggar manufacture pants made from pure finish fabrics that were completed, saleable pants, immediately after the last assembly step was done?

A That were saleable pants immediately?

Q Yes.

A At - - at the time in question?

(Pause)

We probably did, on a ery small scale.

MR. DAVIS: If I could just check my notes for a minute or two, Your Honor?

(Pause)

I have just one other area.

BY MR. DAVIS:

Q Are you familiar with the term "business plan"?

A Certainly.

Q Could you describe for The Court what a business plan is?

A Well, our business plans are a comprehensive plan that determines what we're going to -- what we're going to do. We start -- I can start at the top level and go to the bottom level, but at the top level, it's our strategic plan and our revenue plan and our profit plan and how we're going to execute that plan over any given period of time.

[113]

Q Do your business plans discuss the type of products you will be selling and the requirements for those products?

A Usually, our business plans would discuss that, in general terms.

Q Did you have a business plan that discussed the "Prestige" pants, post-curred pants?

A We didn't have one document, but we had a business plan in place, at that time, and some of the elements, certainly, discussed "Prestige."

Q And, did it also discuss the performance characteristics imparted by the --

A Yes.

Q -- post-curing process?

Do you know if the business plan discussed the techniques of assembly and sewing the pants?

A It would not.

Q When a business plan is made, is it correct to state that virtually every level of the corporate hierarchy is involved?

A That's correct.

MR. DAVIS: No further questions at this time.

THE COURT: Anything further, counsel?

[114]

MR. JOFFE: One question, Your Honor.

REDIRECT EXAMINATION

BY MR. JOFFE:

Q Mr. Bracken, I believe you testified that an oven baked "Prestige" second would sell for twenty-five to thirty percent below the regular price?

A Yes, but I qualified it.

Q Would that same discount apply to other types of seconds?

A Exactly.

MR. JOFFE: No other questions.

THE COURT: Counsel, you said "no questions at this time. Are you through with the witness?

MR. DAVIS: Yes, Your Honor.

THE COURT: Okay. You're excused.

(Witness excused)

MR. JOFFE: Your Honor, may this witness be excused from the Court?

THE COURT: Certainly.

MR. JOFFEE: Our next witness is outside, Your Honor.

THE COURT: Fine.

(Pause)

THE CLERK: Please raise your righthand.
Whereupon,

[120]

A And then, we have the area of sub-assembly. The sub-assembly was broken down into two, which was the fronts, which consisted of Unit 18 and 19 --

Q The fronts, that's Unit 18 and 19.

A And the backs, which consisted of Unit 20 and 30.

Now, the fronts used what was prepared in Unit 11, and what was prepared in Unit 15. And the backs used what was prepared in Unit 25.

Q So, that's the sub-assembly. Could you put an "S" in those areas, please.

[Markings placed on Exhibit]

A And then, after that, we had the fronts and the backs assembled, and then we had to put the garments together, and we were broken down into four lines. And, each of the lines would run either one model -- they could all run different models, or they can run the same model, all together.

But this line, it started from here, and this is the assembly of the line, and here is the pressing area, and here

at the bottom, at the end, is all the sizing stacking and the packing.

And this area, on the bottom part, is where the oven was.

THE COURT: So, you're saying 14, 13, and what is that?

[121]

MR. JOFFE: We can call them 1L, 2L --

THE COURT: Oh, L, excuse me.

THE WITNESS: For line one, two, three, and four.

THE COURT: L1, 2, 3, what you just indicated. Is that correct?

THE WITNESS: That's correct.

THE COURT: Okay.

MR. JOFFE: You can sit down.

BY MR. JOFFEE:

Q So, just to reiterate, I just want to make sure that we're clear, there are four assembly lines.

A That's correct.

Q And then, at the end of each line, is pressing for each line.

Is that correct?

A That is correct?

Q And in this area is where you do the stacking and the sorting?

A The stacking, the sorting, and the packing of the garments.

Q And all of this would be the same, whether it's oven baked or not, correct?

A Yes, it --

[122]

Q In other words, the stacking, the sorting, the assembly.

A Correct.

Q Now, if there was an oven baking operation, what would -- at what point would the pant leave the line and be oven baked?

A If it was an oven bake operation, after being pressed, it would go into conveyors that would go into the oven, and come back and be unloaded and then go through the regular procedure of packing and stacking.

Q So, to reiterate, the only difference foroven baking would be that there would be a conveyor that would take the pant from one of the four lines, to the oven, whichis on the botton left.

Correct.

A That is correct.

Q And then it would be returned to the line at which it left?

A That's correct.

Q And then, at that point, it would be sorted and tested --

A Well, sorted and packed.

Q Sorted and packed --

A Ready for shipping.

Q All right. You can sit down.

[123]

THE COURT: Where are the labels put on? In the same area?

THE WITNESS: The labels -- the labels usually -- the labels were put in the size and stack area.

THE COURT: After they left the oven?

THE WITNESS: Yes, regardless if it was baked or non-baked.

THE COURT: Okay, the same areas.

MR. JOFFE: Your Honor, at this time, we'd like to show a video --

MR. DAVIS: For clarification purposes -- I'm sorry to interrupt – if the Judge could, on the Judge's questions, if the Judge could clarify what type of labels there were?

THE COURT: What -- what kind of labels do you affix to the garments?

THE WITNESS: Okay, there's two labels that are put on -- one in the prep -- two labels in the preparations, and that's done for every product. And, the labels that I'm talking about, put on the back, is that hang-tag and the OCR is – it's basically, it's a hang-tag and an OCR, what we call OCR, and we have a sample of this. This is an OCR --

THE COURT: Is that cloth? Paper? What?

THE WITNESS: No, this is paper.

* * * * *

[154]

When it was unloaded, we have in the video, they were putting this hang-tag on the unloading. In this operaton, they're putting the flasher. And this tag ticket, at the back of the line, what that means, that's going to be what we call the OCR.

Q Do you have some samples of these various tickets here?.

A Yes, I do.

The hand-tag is item number 26BB. The OCR is item number 26D. And, I do not have a flasher.

Q So, I'm correct that all of the paper tags are placed on after the oven baking?

A That's correct.

Q And any labels that are placed on before are cloth?

A Excuse me?

Q And that any labels that are placed on before the oven baking are cloth?

A That's correct.

(Pause)

Here is what we call size and stack. And this, what we're doing here is assorting it, by size, and number of pants, to be ready to put in a container.

(Pause)

I may add, also, by cut, by order number.

[155]

Here, this operation, belt pants. It's adding this belt to the pair of pants, which is item number 26FF. Go ahead.

(Pause)

Here, scan OCR, and load into big packs. What we do here, we have this OCR, this is what the OCR is, has bars. We have a scanning gun, that will pick up, we will pick up our inventories of our products, and load into big packs is actually loading the pair of pants into the container, or big pack.

THE COURT: What does "OCR' stand for? It's an acronym for what? Do you know?

THE WITNESS: I'm not sure.

MR. JOFFE: Optical -- it's the scanners, like at the supermarket.

THE COURT: All right. I was just wondering if he knew or not. I understand.

THE WITNES: Yes, but I'm not sure they're the same.

THE COURT: Had to do with the --

THE WITNESS: That is what we call OCR. It will --

* * * * *

THE COURT: -- with the bar --

THE WITNESS: -- pick up this bar code.

THE COURT: -- keeping the inventory, okay.

* * * * *

[176] in evidence).

MR. JOFFE: Your Honor, at this time, I wanted to offer into evidence the various components that were used by the witness, during the video narrative. They are all Exhibits 26, with a letter suffix.

THE COURT: All right.

MR. DAVIS: I have no objection, Your Honor. Well --

THE COURT: Proceed.

MR. DAVIS: -- if I just may have a very short voir dire, just for a minute.

THE COURT: You have no objection. What are you voir diring about?

MR. DAVIS: Because there was one question I did have.

THE COURT: Then you do object, and you want to voir dire.

MR. DAVIS: Yes.

THE COURT: Go ahead.

VOIR DIRE EXAMINATION

BY MR. DAVIS:

Q Do you know if any of the components, other than the fabric components, were impregnated with resins that required a curing process?

A I do not know.

[177]

THE COURT: Were you -- counsel was the thread impregnated?

Q No, I'm talking about the pocket materials, the bank materials –

A As far as I know, they were not.

Q That's my understanding.

THE COURT: Okay.

Q So, the only -- the only components in issue in this case, that were denied duty-free treatment, are the ones that were impregnated with resins and required oven treatment, oven curing?

THE COURT: Would he know that, that is was denied the --

MR. DAVIS: Well --

THE COURT: Is [illegible] expert on it? I'm not sure.

THE WITNESS: No, I'm not.

MR. DAVIS: Well, then, it's -- I just wanted it to be clear for The Court, then --

THE COURT: I'll agree to it. I have no problem. But, I don't think this witness knows what --

MR. DAVIS: All right, we'll stip -- do you want to stipulate, for the record, then, that the -- of the components that are being now moved into evidence, the only ones that were denied duty-free treatment are the fabric components that were impregnated with r.

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MR. JOFFE: That's correct.

THE COURT: Okay.

MR. DAVIS: All right, no objection.

DIRECT EXAMINATION (RESUMED)

BY MR. JOFFE:

Q Could you look at Exhibit 7, please?

MR. JOFFE: And, Your Honor, this has been admitted, but I would, I want the witness to explain Exhibit 7.

(Pause)

A Okay. The first --

Q Okay, just a minute.

(Pause)

Could you explain to The Court what is Exhibit7?

A They were the standards used at the plant at Haggar Mex at the time of '88-'89.

Q And this was the actual document that was written at the time and used by you?

A Yes.

Q And, if you could turn to the second page, and explain to The Court what is on the second page?

A This is an index of models. Where it says "lot model," what we're looking at right there is the last

* * * * *

THE COURT: You made such a test in 1988 or '89?

THE WITNESS: Yes, I did.

THE COURT: All right. Tell us about that test.

THE WITNESS: It was a quick test, as far as just putting some OCRs and hang tags to the pair of pants, to run it through the oven, at the required temperature and required time, taking it out, and then putting my finger to it and rub on it, and some ink did smear.

THE COURT: The only thing that happened is the ink smeared?

THE WITNESS: Yes.

THE COURT: Was there any crinkling or folding or anything else of the material, or crumpling of the paper?

THE WITNESS: Not on the samples that I saw.

THE COURT: All right. So, what you know is that the ink might smear if you put it through this process?

THE WITNESS: That's correct.

THE COURT: That's the only effect you're aware of.

THE WITNESS: That's the only effect on ticketing.

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THE COURT: And that was -- and that is the basis of your statement, based on what you did and saw?

THE WITNESS: That is correct.

Now, as far as the --

THE COURT: All right, so, now, we're beyond the realm of expertise on this. It's a test.

Do you have any questions on it, counselor? Do you have an objection to it?

MR. DAVIS: I'll leave it for cross examination.

THE COURT: All right.

MR. DAVIS: But I stand on my objection --

THE WITNESS: Can I add --

THE COURT: Excuse me?

MR. DAVIS: My objection remains, but you're not --

THE COURT: Well, the objection you made was on a question of his testifying as an expert and giving an opinion.

MR. DAVIS: That's correct.

THE COURT: He has not given testimony as an expert or given an opinion. He's stated he actually performed it, himself.

MR. DAVIS: All right, I misunderstood Your Honor's statement, and if he's not going to give any --

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objection, so I agree to its admission.

THE COURT: Fine. Proceed.

You intend to offer it? Continue to offer it, is that correct, counsel?

MR. DAVIS: It was a continuing offer, subject to my objection.

THE COURT: All right, so, it's received. Exhibit 6, received, and just for the purpose -- what is that?

MR. DAVIS: It's captioned "Haggar Apparel Non-Assembly Operations, detailed Model 245, Mexican production factility (belted model)."

(Whereupon, Plaintiff's Exhibit 6, having been previosly marked for identification, was received in evidence.)

BY MR. DAVIS:

Q Now, in making the actual pocket bags, on the Model 245 --

A Back pocket or front pocket?

Q The bags for either one -- the pocket bag, itself, is that an assembly operation that's done at the Mexican facility?

A That is correct.

* * * * *

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Q Are there any components of the bags, that would be considered fabric components, that were impregnated with resins that required curing?

A Not that I know.

Q In the zipper operations, where you have the zipper material and you also put on it --

A Zipper slider?

Q -- the slider and the stopper at the end, does that involve any material that was impregnated with resins and that required curing?

A Not that I know.

Q The buttonholing operations, did that involve any material that -- did the operation, itself, -- withdrawn.

The buttonholing operation, itself, was that an assembly of two or more solid components?

A Do you consider the thread to be a component?

Q Yes.

A There was thread put into the fabric, so that is an assembly.

Q Was it also a forming operation, where you cut open the buttonhole?

A It was the hole opening, yes.

Q Now, in the pocket opening operation, was there any joinder of two or more solid components?

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A Can you be more explicit -- more specific about a pocket opening?

Q Is there a pocket slashing operation, where you have something that's closed, and one of the machines that are used at the plant has a knife that cuts through and opens the pocket?

A There, there is sewing, so the, so there is an assembly. It is putting pieces together, yes.

Q Not --

THE COURT: That's not his question.

Q-- that's not my question.

THE COURT: Just answer the question.

Q My question is is that, let's say, you finished assembling the pocket.

A Um hmm.

Q Then the next stage is you have to open the pocket, so something can be put into it. It's completely closed. So, you have a pocket cutting or slashing operation.

Is that correct?

A That is correct.

Q In that pocket slashing operation, is there any assembly, any joinder of two or more solid components?

A In that specific -- no, but we, the way we study, we study the operator doing something as of the time

* * * * *

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now.

MR. DAVIS: Well, because it's going to get into cross-examination. I'm trying to save time.

MR. JOFFE: Well, the--

MR. DAVIS: Because I'm going to go through Exhibit 4, where he disagrees with what we're saying.

MR. JOFFE: If it says something different, then it speaks for itself.

MR. DAVIS: All right.

THE COURT: All right, no stip on this.

BY MR. JOFFEE:

Q On number five --

THE COURT: And your testimony is that it is just an assembly.

THE WITNESS: That is correct, and it does not come in a roll.

THE COURT: Testimony, no stip.

A Chop left fly. This one has both. This actually has the sewing of the fly lining to the fly, and at the bottom, it cuts off that roll of band lining.

THE COURT: Excuse me? What does it cut off?

THE WITNESS: The band lining, that is being sewn first? It cuts off the bottom part of it.

THE COURT: Oh, the excess?

THE WITNESS: The excess.

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THE COURT: Like a trimming operation?

THE WITNESS: Like a , whatever you want to call it. It has a knife. After you sew, it has a knife on the side, so all we do, we waste some thread, but we try to do it, cut it at the bottom.

BY MR. JOFFE:

Q Now, if you were to allocate the labor time associated with both the sewing and the other aspect, how would you do that?

A The standards are broken down, on all the steps of this particular operation, and the amount of element of time, as far as the cutting time, would be less than the whole cycle time. Is that what you're asking?

Q Well, yes, but the Judge may decide to divide the time for this step 5, and we need to know how to allocate that.

A Okay, the way you do it is to get back to our standards, where our engineers did it --

Q Well, now I'm asking you. You've seen this operation, haven't you?

A Yes, I have.

Q Okay, I, we've got the information from the standards. I want to know, from your experience, how would you break it down, as far as labor time? Fifty-fifty? Twenty-eighty? It doesn't have to be exact, but we --

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MR. DAVIS: Objection. I object if it's speculation. I don't want him --

THE COURT: I'll give --

MR. DAVIS: -- speculating on times --

MR. JOFFE: It's not --

MR. DAVIS: -- on what occurred five years ago --

THE COURT: -- I'll take his best --

MR. JOFFE: -- no.

MR. DAVIS: -- or six years ago.

THE COURT: -- I'll take his best --

MR. JOFFE: No, he's making --he's --

THE COURT: -- estimate. Have you observed this process being done?

THE WITNESS: Yes, I have.

THE COURT: Have you observed what the operators do when they perform this process?

THE WITNESS: Yes, I have.

THE COURT: What's your best estimate as to the amount of time that the operator takes to do -- now, divide it. You may continue to question.

BY MR. JOFFE:

Q Yes, as far as allocating between the cutting and non-cutting.

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A I would say the cutting of the fly lining would be about five to ten per cent.

Q Okay, thank you. Okay, number six. Wait -- on number five, so the cutting would be five to ten. So, the sewing would be between ninety and ninety-five percent?

A Yes.

Q Okay, number six.

A Number six, supply and handling, is the person that actually gets the supplies to start the process. That means the thread, the cut pieces, and move the bundles around the unit.

Q That doesn't involve the joinder of two pieces of fabric, of two solids --

A That's correct.

Q -- so we can, so that would be no.

A Yes.

Q Okay, number seven?

A Attach hook to left band. That, we had, that is, that is attaching, the joinder of two solids. And also, the actual cutting of the trimming or the ban-roll piece.

Q So, what percentage of the time would you allocate to the cutting, based on your personal experience,

* * * * *

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A Yes.

Q Twenty-eight, joinder of two solids?

A No.

Q Twenty-nine was stipulated to. Thirty, the joinder of two solids?

(Pause)

A Yes.

Q Okay, thirty-one is stipulated to as yes. Thirty-two, joinder of two solids?

A Did you say that thread was considered to be a solid?

Q Yes.

A Yes.

Q Thirty-three, joinder of two solids? That was stipulated to. Thirty-four, joinder of two solids?

(Pause)

A No. Thirty-four is no.

Q Okay, thirty-five, thirty-six, thirty-seven, and thirty-eight were stipulated to. Thirty nine, joinder of two solids?

A There is a joining of two solids, and there is a measurement involved.

Q Okay, what percentage is the measurement?

A About ten percent.

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Q So, that would be ninety per cent joinder and ten per cent non-joinder?

A Yes.

Q Okay, number forty would be no. Correct?

A That's correct.

Q Okay, forty-one, the joinder of two solids?

A Yes.

Q Forty-two, joinder of two solids?

A No.

Q Forty-three, the joinder of two solids?

A Yes.

Q Okay, forty-four through forty-seven --

THE COURT: Stipulated. Forty-eight?

Q -- were stipulated. Forty-eight?

A No.

THE COURT: Okay, the trimming of the threads, he was not going to contest.

THE WITNESS: Right, this trimming --

THE COURT: Is that correct, counselor?

MR. DAVIS: No, this is different. This is after all assembly, where you trim all excess off.

THE COURT: And now you're going to --

MR. DAVIS: In other words, where you -- where [314] that correct?

* * * * *

A Yes. What is -- I can't see it.

Q Among the other fabric components.

A Yes, that's correct.

Q Were those cutting operations necessary in order to do assembly in your plant?

A The cutting operations from Weslaco?

Q Yes.

A That is correct.

Q Would you consider those cutting operations, where you actually take a large bolt of fabric and cut the components to a specific shape, would you consider those incidental to the assembly operation, because they were necessary to be performed before assembly?

A Incidental --

THE COURT: Do you want to rephrase the question? I'm having difficulty in following it, as well.

MR. DAVIS: All right, excuse me. I'm sorry, Your Honor.

THE COURT: I have some difficulty in following it, so perhaps you can make it simpler.

BY MR. DAVIS:

Q Now, you stated earlier with regard to the cutting operations that were performed at your plant, that all of those operations were necessary for assembly. Do you remember that?

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A That is correct, yes.

Q Is it correct to state that all of the cutting operations performed at Weslaco were also necessary for assembly?

A Yes.

Q Now, in the course of your perparing for this case, did you --

THE COURT: Now, wait a minute. Do you want to conclude that? What do you want to draw from that? Both of them were necessary.

MR. DAVIS: Right.

THE COURT: The question is whether the second one was necessarily performed at his plant, is that not true? Or could have been performed in Weslaco?

MR. DAVIS: That's not what he testified to. He said it's necessary for assembly.

THE COURT: Both are necessary for assembly.

MR. DAVIS: Okay, I'll take it one step further.

THE COURT: I'm just trying to understand it.

MR. DAVIS: All right.

BY MR. DAVIS:

Q Are there Haggar plants, today, where you have the cutting operations, such as performed in Weslaco, and

* * * * *

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MR. DAVIS: We will. That's what I'm trying to do, among other things.

THE COURT: He's saying he's using your witness as his witness, is what he's telling you.

MR. DAVIS: That's all --

MR. JOFFE: Major or minor is, is not evidence of anything.

MR. DAVIS: He deals with time. That's his job for --

MR. JOFFE: No, no --

MR. DAVIS: -- who knows how many years.

MR. JOFFE: We have the --

THE COURT: No, that's not the argument. Ask your question. What is the question? Do you consider attaching what to what --

BY MR. DAVIS:

Q Do you consider the first operation, sew zipper to left fly, to be a major operation?

A In regards to what? Would that be an important operation? Yes.

Q Look, may -- all right. It's an important operation, okay?

A It's part of assembly. Every part of the assembly is important to us and it's a major operation. Everything --

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Q And there --

A -- is, and we don't classify it as major or minor. Everything is the same operation for us.

THE COURT: You can't have a pair of pants without a fly, counselor. Go ahead, next.

MR. DAVIS: That's not true, Your Honor.

THE COURT: You can, but then I would have to do further exploration, but go ahead.

BY MR. DAVIS:

Q Now, would you consider, for "Prestige" pants, given your use of the term, would you consider the curing operation to be major, then?

MR. JOFFE: There, again, I'm going to object to the question. It calls for a legal conclusion, Your Honor.

MR. DAVIS: That's not true. It's a word in the English dictionary.

THE COURT: Now, "major" may have several different connotations in the dictionary. I'm sure if you get a dictionary out, you might find five or six variants of it.

MR. JOFFE: Well, the *Mast* test is minor, whether it's minor. So, asking if it's major --

THE COURT: I will not accept that question in the context of *Mast*. The Court will decide that issue.

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MR. DAVIS: I understand that completely, Your Honor. I was -- I need some leeway in this area.

THE COURT: All right, but counsel is concerned that Mr. Davis is trying to get something in the record which he will later use within the context, claiming that --

MR. DAVIS: But Your Honor can judge that --

THE COURT: -- their witness said it was major; therefore -- he will testify to a fly being major, cuffs being major, everything being major. But, within the context of the law, as to whether or not it is eligible, those things alone will not exclude them.

MR. DAVIS: I understand that, Your Honor.

THE COURT: Within the major-minor context.

MR. DAVIS: I understand that, Your Honor.

THE COURT: Well, then, where are we going?

MR. DAVIS: If I can have some leeway with this witness, it will be -- it won't be long. His objection is to the use of the term "major." The witness already explained how he uses it. So, right then and there, that waters down his argument entirely.

THE COURT: Okay. Go ahead. I'll give you a little leeway, to see where you're going.

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THE WITNESS: Can you -- can you say the question again?

THE COURT: Do you have a question?

BY MR. DAVIS:

Q All right, in the manner in which you described the sew zipper to left fly as a major operation, do you remember answering that question, --

A What I did --

Q -- on why you said it was major?

A -- I, that, what I --

THE COURT: You said major you considered important.

MR. DAVIS: Right.

THE COURT: Let's use his term, "important."

THE WITNESS: Well, I also did say that we, we never classify our operations as major or minor.

MR. DAVIS: That -- that's also -- that's all in the record.

THE COURT: All right, so, just get away, so everybody is happy, --

BY MR. DAVIS:

Q Okay, now, is oven curing --

THE COURT: -- important to the procedure. We'll use that language.

Q All right.

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Is oven curing on the 245 pants in issue in this case important to the procedure, in the same sense that sew zipper to left fly is important?

A If it's part of the assembly that I was asked to do, it is important.

Q But is the curing operation part of the assembly?

A Depends on the product we're working on. If it is part of the assembly, that has been stated, to be baked, it is important.

Q Wasn't it stipulated that all assembly occurs before pressing and --

THE COURT: Counsel, we went through this before. When he was using, he was considering the context of work done at his plant, they consider it as part of the assembly. You have a stipulation that they're fully assembled before the baking process. How many times do you have to go into this?

MR. DAVIS: The -- the reason I'm going into it is now he's telling me it's not part, it is part of the assembly. In his deposition he said it's not part of the assembly.

THE COURT: Well, you hear a lot of things, counsel. You've got stipulation. He thinks it may be or [331] may not be.

MR. DAVIS: All right.

THE COURT: Depending on the context in which it's used.

MR. DAVIS: Fine.

THE COURT: I'm not going to decide this case on what he thinks assembly is, or the stipulation. Go ahead.

MR. DAVIS: Okay, thank you, Your Honor.

THE COURT: As far as -- I'll take it into consideration on credibility. Next.

(Pause)

BY MR. DAVIS:

Q Well, I didn't get his answer, so in the context of the operations that we discussed, the sew zipper to left fly, would the curing process also be considered a major operation --

THE COURT: Important. We're using his term and definition --

Q I'm sorry, important.

THE COURT: -- and he said yes.

A Yes.

Q Okay. In terms of --

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THE COURT: Is cutting off threads important, too?

THE WITNESS: Yes.

THE COURT: Go ahead. He thinks everything is important, to get the completely finished product. Next.

BY MR. DAVIS:

Q In terms of time and cost comparisons, based upon your experience as an industrial engineer, is the sew zipper to left fly an important or significant operation?

A In terms of --

Q Time and cost, as compared to the time to make the whole pants or the cost of the whole pants.

A In com --

Q Just the sew zipper to left fly, would you consider that --

A It would be a very small part of the whole --

Q A very, very small part.

A Yes.

Q Okay. (Pause) Now, you stated on operation number four, that there was no cutting done there. It was only the joinder of two or more components?

A Yes.

* * * * *

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Q For Unit 11 --

A -- purposes.

Q For Unit 11. Is that correct?

A That is correct, but it was never --

Q And Unit 11 is a sub-assembly unit.

A It's a preparation but it was never done in Unit 11.

Q Excuse Me?

A It was never performed in Unit 11.

Q I'm not talking about at your plant.

A No, I'm talking about any plant in Haggar Company.

THE COURT: What is Unit 11? Is that something in this plant?

THE WITNESS: It's the fly area.

MR. DAVIS: Unit 11 is uniform in Haggar.

THE COURT: It's all flys?

THE WITNESS: Yes.

THE COURT: Okay. Now, he's testified, I think clearly and distinctly, unless we really want to go into this and it seems some value to you, that he gets these things cut, pre-cut --

MR. DAVIS: Right.

* * * * *

[456]

THE COURT: Give it to me.

MR. DAVIS: All right. (Pause) Beginning at 38. One can have a fully assembled pair of pants without the pressing operation.

THE COURT: I agree with that.

MR. DAVIS: That means that --

THE COURT: The question is whether another process would logically be done during the assembly.

MR. DAVIS: Your Honor, --

THE COURT: I agree with you. It's stipulated to. I don't think anyone is disputing that. The question now is whether or not the operation -- you're saying it was not performed during assembly.

MR. DAVIS: That's correct.

THE COURT: It's performed after assembly. I will say that.

MR. DAVIS: That's what this criteria says. Will logically perform during assembly.

THE COURT: This is not apply.

MR. DAVIS: Excuse me?

THE COURT: This does not apply. Parties concede that it's not. No application. It's clearly stated that's its performed after assembly.

MR. DAVIS: Right.

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THE COURT: That's stipulated. It was not performed during assembly. It doesn't apply. The criteria does not apply. There was nothing performed during assembly as far as the oven baking process is concerned, so this criteria does not apply. Therefore, it's neither for or against the government or for or against the party on this criteria. It has no application to the facts of this case.

MR. JOFFE: Your Honor, I don't read the mass test to be that narrow to define assembly to mean to the point of the physical completion of the garment. I would interpret it to mean the entire operation, the assembly operation at the facility. I think it has to be read in that context.

THE COURT: I think when you take it out of the context of four, doesn't four cover that?

MR. JOFFE: I think three and four overlap.

THE COURT: Doesn't four cover in this case while three has no application of the dispute in this case?

MR. DAVIS: If I could just have a minute to discuss the mass --

THE COURT: Okay, good.

MR. JOFFE Your Honor, by way of example, pressing, which is acceptable, occurs in time after the assembly but it is regarded as related to the assembly.

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MR. DAVIS: Where does it say it's related to the assembly?

THE COURT: He's saying that it was not during the assembly. You can see that the assembly process was completed when the pressing was done. This may not have an application, but certainly you have to consider whether or not it was an economic or practical consideration dictate that the operation be performed concurrently or consecutively or near the time of assembly.

I'm not bound by the exact words.

MR. DAVIS: I understand that, Your Honor, but let's look at the criteria we're discussing. I quote, in discussing the criteria, whether the operation is solely related to assembly that they were logically performed during assembly. Then it explains that criteria. Not wholly or in proximity, but closely related to the assembly process. Both involve taking needle and thread to fabric as in the assembly process. Both are done with special sewing machines.

The relationship of these operations of assembly is further demonstrated by the availability of alternative closers and packers which may be obviously incorporated in pants through operations which are solely assembly operations.

Then they have an analogy of assembly equipment. There's an analogy with the process of assembly.

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THE COURT: This was not --

MR. DAVIS: That is what they were saying.

THE COURT: This was not logically performed during assembly. It was not performed during assembly. I'm saying, this criteria has no application to our case.

MR. DAVIS: The government will go one step further. Mass. The decision itself defines what is meant by relation to assembly, even if during assembly. By relation to assembly at the type of process and the type of machinery used. It's clearly unrelated to assembly here because there is absolutely no connection between curing and an assembly process. They don't use the same type of machines. They don't use the same type of process.

THE COURT: I'm not going to -- criteria three does not apply in this case. It clearly is not done during assembly.

MR. DAVIS: If it doesn't apply, then it means it's --

THE COURT: If it doesn't apply, then it means it doesn't apply. I have to balance in the other factors.

MR. DAVIS: I understand that.

THE COURT: That's all I'm saying.

The fourth one is whether the economic or other practical considerations dictate that the operation be formed concurrently with assembly.

* * * * *

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The way that it's done now is that it's shipped from Mexico to distribution centers. In addition, there would be a time delay created by doing it in the United States which affects their economic and marketing considerations.

Mr. Bracken discussed the technical reasons why it would be less advantageous and less economically beneficial to do it in the United States. Because of the curing operation, there is an inadvertent curing that starts --

THE COURT: You cannot use that because you have an agreement. I've already ruled that you have an agreement.

Although, if you won't accept this, you may want to couch it in terms of not curing. I accept the stipulation. The curing process is oven baking. I will eliminate that.

MR. JOFFE: I think the point is not pressing and curing, but that --

THE COURT: I'm going to disregard it because the only curing process is that. He did not say, but he may have meant -- I'm not going to find it in the evidence. Somehow something happened there that started a reaction. I disregard the evidence because I take the stipulation.

In other words, in summary, what you're telling now is they have testimony on this record which states that [482] reversible.

MR. DAVIS: Not on the language differences, Your Honor. Not on these differences.

THE COURT: That's why you disclose it.

MR. DAVIS: Crease retention and surface flatness are very important to Haggar in manufacturing, advertising and marketing these pants since they are important to the consumer. If consumers purchase pants that do not have proper crease retention or surface flatness, they have returned them for improper performance.

That question was read -- my recollection, verbatim --

THE COURT: What do you say about that? Agreed. There's no problem, then, is there. Let's get it down. It's agreed. I don't know how it's relevant to anything here that we need it for, but go ahead.

MR. DAVIS: Haggar is very strict regarding it's standards and directions to manufacturing facilities in order to insure surface flatness and crease retention.

THE COURT: Haggar is not going to dispute that.

MR. DAVIS: The proper pressing techniques are absolutely essential to crease retention and surface flatness.

THE COURT: Do you agree with that?

MR. JOFFE: Could you read it one more time?

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MR. DAVIS: The proper pressing techniques are absolutely essential to crease retention and surface flatness.

MR. JOFFE: Fine.

THE COURT: We can just take this off the recording, can't we?

Next?

MR. DAVIS: If Haggar had merely assembled these pants without either the pressing or the oven baking operations, Haggar would not have sold these pants as a prestige line pants, as they would not have met the performance requirements.

THE COURT: I assume all pants have to be pressed or you won't sell them as prestige pants, is that correct?

MR. JOFFE: It's not correct. Jeans. There are many --

MR. DAVIS: These pants.

THE COURT: I'm sorry. The models in question are the ones we're referring to.

MR. JOFFE: Modify it to the models in question and we'll agree.

MR. DAVIS: It said prestige.

THE COURT: The questions are not important to the determination of the case. It would be much simpler if we just forgot them. They are not an issue. It's not a [484] question --

MR. DAVIS: The answer was important. The difference that they're raising is not important.

If Haggar had merely assembled the oven baked pants without either the pressing or the oven baking,

Haggar would not have sold these pants as a prestige line pants, as they would not have met the performance requirements.

MR. JOFFE: Agreed. Next.

MR. DAVIS: There are Haggar standards for the appearance and the placement of the crease. If the crease was not properly placed in the proper area or the crease is not proper because of improper pressing or oven baking, Haggar never sold those pants as a prestige line pants because it would be considered all quality.

THE COURT: Is that correct?

MR. JOFFE: Agreed.

MR. DAVIS: If the oven baking was properly done and the defect was caused by the pressing prior to baking, than the error was irrevocable.

If the oven baking was properly done, and the defect was caused by the pressing prior to baking, than the error was irrevocable.

THE COURT: Agreed.

MR. DAVIS: The oven baking process is the final process that causes these pants, if everything else is done [485] property [*sic*], to meet the design and quality assurance requirements of Haggar for that pants to be sold as a prestige line pants.

MR. JOFFE: There are other events --

MR. DAVIS: You didn't hear the question.

THE COURT: Did they sell them without their tags? Read the question.

MR. DAVIS: The oven baking process is the final process that causes these pants, if everything else was done properly, to meet the design and quality assurance requirements of Haggar for that pants to be sold as prestige line pants.

THE COURT: Okay. Agreed.

MR. DAVIS: For the pants in issue, the d-sired crease to be placed in these pants is accomplished by the combination of the pressing and baking. The desired positioning of the crease and its appearance are creaded by the pressing operation.

THE COURT: Agreed.

MR. DAVIS: In order to retain the desired crease, Haggar has set forth standards for oven baking this type of garment.

THE COURT: Agreed.

MR. DAVIS: You can have two pair of pants in which the identical assembly process is performed. If one is [486] properly cured and the other is not, the first will be sold as a first quality prestige pant while the second would never be sold as a prestige pant.

THE COURT: Agreed.

MR. DAVIS: He said that it would not have the prestige label on it. It would be sold as a second. I'm going to get to that part coming now.

THE COURT: I'm not going to disagree with it. You're not going to sell defective pants as prestige pants, but go ahead. Read it again.

MR. DAVIS: You can have two pair of pants in which the identical assembly process is performed. If one is properly cured and the other is not, the first will be sold as a first quality prestige pants while the second would never be sold as a prestige pants. It may be sold as an off quality with discounts ranging from 20 to 25% at Haggar's level of sale to 25 to 30% at the retail level.

THE COURT: That could vary by market considerations.

Let's take it in pieces. Are you going to sell prestige pants if it's improperly cured?

MR. JOFFE: No.

THE COURT: Now, that portion of it --

MR. JOFFE: He said, he did testify that generally at the Haggar level, there is a 20 to 25 --

* * * * *

[491]

don't know if they all agreed, but it was a business plan of the corporation, to advertise that they were wrinkle free.

MR. DAVIS: That was just part of the -- the business plan is not the same as marketing and advertising plans.

THE COURT: I don't care if you have business plans, marketing, analysis. It's important. It's wrinkle free. What else do you need?

MR. DAVIS: That any portion of the assembly process was not part of the business plan or the ad or marketing plans.

That was testified to by Mr. Bracken.

MR. JOFFE: I'm not sure what that means, Your Honor.

THE COURT: I'm not sure what that means, either. In other words, they didn't advertise that aspect. That is what he is saying. They didn't advertise the fact that they double stitched something or single stitched it or double seamed. What they did advertise was the fact that this was wrinkle free. Yes, I find that -- there's no testimony on the record that they advertised otherwise.

Is that part of the record that they did not advertise other aspects?

MR. DAVIS: Yes. Mr. Bracken testified.

THE COURT: What did he testify to?

* * * * *

[495]

MR. DAVIS: I don't care if he said it was in writing or not. Based upon his deposition of what a business plan is, it shows what it means and that it's significant.

He stated that there was a business plan, that the business plan discussed the wrinkle resistant and permanent press aspect of these pants. They did not discuss the assembly aspects of these pants. And that the business plan was reviewed from the top of the corporation down. Therefore, the area of wrinkle resistant to these pants permeated the entire corporate structure.

MR. JOFFE: That's the purpose of this.

MR. DAVIS: If he doesn't want to stipulate to it, fine. We have the testimony on record.

THE COURT: Give it to me and I say so what, what about it? What relevance --

MR. DAVIS: In my opinion, and I will argue, that the mass factors are not the beginning and the end of determining what is major and what is incidental. The Courts have said so, including Your Honor. You don't have to look at cost comparisons and time comparisons. Sometimes you can have --

THE COURT: I will find now that the issue of wrinkle resistant was extremely important to the company, in the manufacture and sales and promotion of these garments.

I find that. [500] disputed, is it?

MR. JOFFE: No.

MR. DAVIS: Will you make the finding, then, that this aspect, the curing aspect of these type of pants to get this performance requirements was something that permeated the corporate structure in planning the manufacturing and selling --

THE COURT: Permeating. When something permeates a corporate structure, they don't go to sleep at night, they think about it. It was important to them. That's what I'm going to find.

MR. DAVIS: I'll just take care of it in my brief, that's all, Your Honor.

THE COURT: I find it's an important factor whether or not the bookkeeper, whether or not the secretary, whether or not the entire structure, whether or not the First Vice President, the Second Vice President, Third Vice President, all had the consideration, I don't know. It was an important factor to the corporation and certainly to its CED, who testified here. I can make that finding without dispute. Is that correct? It's agreed to. There's just too many of these things.

MR. DAVIS: All right, Your Honor.

I have others, but it would take an awful long time to go through it.

* * * * *

[503]

MR. DAVIS: Lines 5 through 7.

THE COURT: Five through 7?

MR. DAVIS: Five through 7. The oven baking process is not at all related to assembly.

THE COURT: I'm not going to make that finding because it's already been agreed to. Correct? It's following the assembly process. The assembly process --

MR. DAVIS: It's not at all related to assembly. There's a difference.

THE COURT: Okay.

MR. JOFFE: We can't agree to it in that context.

THE COURT: You tell me why it's related to the assembly process.

MR. DAVIS: I think it's more important that he show something in the evidence of record --

THE COURT: That's what I'm asking for.

MR. JOFFE: I think it goes to the definition of related, Your Honor.

MR. DAVIS: That is what the witness said.

THE COURT: Just give me -- my understanding of the case thus far is that assembly is complete at the time or before the pressing out takes place, right? Do the parties agree to that? Assembly is complete.

Tell me why you say -- is there anything in the record, number one, that says that this process is in some

* * * * *

[505]

The question here is, how is pressing related to the assembly process?

MR. JOFFE: I think that the relationship -- the phrase related is not restricted to merely --

THE COURT: Tell me how you define it so that I can find -- everything, I assume, is related to the object that's being manufactured.

MR. JOFFE: I'm not sure how the phrase is being used because you've already ruled on one of the mass factors. You said that there was no relationship.

THE COURT: No relationship --

MR. JOFFE: Why are we even discussing it?

THE COURT: He agreed to that factor, there is no relationship.

MR. JOFFE: Fine.

THE COURT: Next?

MR. JOFFE: I have no problem with that.

(Pause)

THE COURT: I now find that it's not related to the assembly process.

MR. DAVIS: In reality, there is no relationship of the pressing to the assembly of the pants.

THE COURT: Again, my response would be the same: do you have some other argument or something else in the record that would --

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MR. DAVIS: That would be consistent with --

THE COURT: Pressing is not related to the assembly process. It is something that is done after assembly. Perhaps it might be because it's the best time to do it, but it's not related to the assembly process.

MR. DAVIS: Your Honor, I understand that you're making these findings, but I don't want to concede these for the purposes of the record. We don't agree with --

THE COURT: Any finding I make, when it's not with the consent of the parties, means that if I'm in error and there's no basis upon which I made my finding, you can

argue that to the Appellate Court. Certainly. If the decision is adverse to you ultimately. I'm not pre-judging that.

MR. DAVIS: The trim of the pants, operations 6747 and 6757, of plaintiff's Exhibit 3, have no relation to assembly. It's a matter of appearance. It's R145, 146. In particular, R146 lines 5 through 8.

I'll read it verbatim: --

THE COURT: 146?

MR. DAVIS: Starting at 145 to get the background so we know what we're talking about. 145 at line 18: Now, in contrast, when you have the trim operations, like operation 6747 and 6757, do you see which ones I'm talking about? The answer, yes. The question, while those themselves are not assembly operations, they do have a

* * * * *

[511]

THE COURT: What findings are those?

MR. DAVIS: There's a difference between being related to the assembly process and being part of the assembly process. You just found it's part of the assembly --

THE COURT: I'll find it's related to the assembly process. You can then add it on the other side of your closing. You'll probably argue that later.

It's related to the assembly process. I found the pressing and the other was not.

That leaves your argument in fact as to which side you're going to put it on.

(Pause)

Counsel, that still leaves open the over arching issue as to whether or not I have to decide whether the assembly process has to be construed by me as being so narrow as merely stitching and doing absolutely nothing after the stitching made.

MR. DAVIS: I didn't say that, Your Honor. There are nuances in this that I would prefer to leave to the brief.

THE COURT: In other words, like the fact that you're trimming, whether or not that is the assembly process itself. I might construe it also to include that. It's something I would like argument on, whether or not threads

* * * * *

[545]

context?

THE COURT: Okay.

MR. JOFFE: For economic and practical considerations, Haggar oven bakes immediately following assembly and pressing but prior to the attachment of hang tags and other items packing and shipping. Otherwise, additional cost and expenses would be incurred in that these operations would have to be duplicated.

MR. DAVIS: Which operations?

MR. JOFFE: The packing and shipping.

THE COURT: The garments would have to be repacked and reshipped.

MR. DAVIS: We would stipulate that if the pressing and oven baking occurred in the United States, that they would first have to be packed and shipped form Mexico to the United States and then after oven baking and pressing, they would have to be repacked and reshipped to the distribution center.

THE COURT: Additional costs would be incurred by these processes.

MR. DAVIS: That's correct.

THE COURT: Agreed to.

Next.

MR. JOFFE: The initiation of curing in the pressing operations is inadvertent.

[546]

THE COURT: I thought I ruled that we were accepting the stipulation. The curing process is done by the oven baking procedure. I'm disregarding testimony on that.

MR. JOFFE: Concerning the duplication of costs, I would also like to state that in addition, Haggar would have to establish another U.S. operation, create another additional work shift and incur additional labor costs.

MR. DAVIS: I will not agree to that, that they have to create an additional U.S. operation. I will agree to that if the –

THE COURT: Additional facilities would have to be made available. I believe his testimony is to the effect that if this is not done in Mexico, there is not sufficient plant

in the United States at the present time to perform these functions.

MR. DAVIS: And that they would have to add an extra work shift.

THE COURT: And add another work shift.

MR. DAVIS: That means -- it's either one or both. They don't have to add more facilities if they add an extra work shift. Once you add an extra work shift, you have the facility.

THE COURT: Do we agree to that?

MR. JOFFE: Yes.

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THE COURT: Agreed to. I'll ask you to repeat it, you've got to have the language down.

MR. DAVIS: It is agreed that if, based upon the testimony on record, that if the oven baking and pressing are not done in Mexico for all these plants, but they were assembled in Mexico and then shipped on the United States for oven baking and pressing, that an additional work shift would have to be made to accommodate the oven baking and pressing in the United States at an additional cost.

MR. JOFFE: And additional labor cost would be incurred.

MR. DAVIS: Yes. Labor costs, additional labor costs.

Withdrawn. I take that back. They would save the labor costs in Mexico.

THE COURT: At the rate of --

MR. JOFFE: It would be in excess of --

THE COURT: -- the United States. Potentially in excess.

Do you agree with that? The Court takes judicial notice that the rates in Mexico and the rates in the United States are substantially different.

MR. DAVIS: I don't know that that --

THE COURT: I think that's a commonly known fact.

MR. DAVIS: I'll do, on occasion involving

CERTIFICATION OF SERVICE BY MAIL

SAUL DAVIS certifies that I am an attorney in the office of the Assistant Attorney General, Civil Division, Commercial Litigation Branch, International Trade Field Office, with offices located at 26 Federal Plaza, New York, NY 10278, and that on May 15, 1997, on behalf of the United States, defendant-appellant herein, I caused the Joint Appendix in Appeal No. 97-1002, to be served upon:

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attorney(s) for the plaintiff-appellee herein, by the deposit of two copies thereof in a United States mail receptacle, properly enclosed in a securely closed envelope, duly franked or postage prepaid, addressed to said attorney(s) as above indicated.

/s/ _____

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No. 97-2044

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

v.

HAGGAR APPAREL COMPANY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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39 pp

QUESTIONS PRESENTED

1. Whether regulations issued by the Treasury Department under the Tariff Act are entitled to deference in determining the proper tariff classification of imported goods.

2. Whether 19 C.F.R. 10.16(c) reasonably interprets the statutory phrase "operations incidental to the assembly process" in Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States to exclude the "permapressing" of items of clothing assembled abroad.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 127 F.3d 1460. The opinion of the Court of International Trade (Pet. App. 7a-24a) is reported at 938 F. Supp. 868.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1997. A petition for rehearing was denied on February 20, 1998 (Pet. App. 5a-6a). On May 7, 1998, the Chief Justice extended the time for filing a petition for a writ of certiorari to June 20, 1998. The petition for a writ of certiorari was filed on June 18, 1998, and was granted on September 29, 1998.

The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 28 U.S.C. 2643(b) provides:

> If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.

2. General Headnote 11 of the Tariff Schedules of the United States, 19 U.S.C. 1202 (1982), provides:

> The Secretary of the Treasury is hereby authorized to issue rules and regulations governing the admission of articles under the provisions of the schedules. The allowance of an importer's claim for classification, under any of the provisions of the schedules which provide for total or partial relief from duty or other import restrictions on the basis of facts which are not determinable from an examination of the article itself in its condition as imported, is dependent upon his complying with any rules or regulations which may be issued pursuant to this headnote.

3. Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. 1202, provides that, with respect to:

> Articles * * * assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition

> ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting[, the duty that is to be paid is to be calculated] upon the full value of the imported article, less the cost or value of such products of the United States * * *

4. 19 C.F.R. 10.16(c) provides:

> Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article. The following are examples of operations not considered incidental to the assembly as provided under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202):
>
> (1) Melting of exported ingots and pouring of the metal into molds to produce cast metal parts;
>
> (2) Cutting of garment parts according to pattern from exported material;
>
> (3) Painting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics;

(4) Chemical treatment of components or assembled articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles;

(5) Machining, polishing, burnishing, peening, plating (other than plating incidental to the assembly), embossing, pressing, stamping, extruding, drawing, annealing, tempering, case hardening, and any other operation, treatment or process which imparts significant new characteristics or qualities to the article affected.

STATEMENT

1. Haggar Apparel Company brought this suit in the United States Court of International Trade to recover customs duties paid under protest in 1988 and 1989. The duties were paid by Haggar in connection with the importation of slacks that had been assembled in Mexico from components manufactured in the United States. While in Mexico, the garments had also been subjected to a "permapressing" operation that involved the pressing and oven baking of components to which a chemical resin had been applied. This process is designed to make the garment wrinkle-free and thus to eliminate the need for ironing after laundering (Pet. App. 8a-9a). As the trial court stated, "The most important performance characteristics of [the Haggar] pants are crease retention and seam and surface flatness; the pants are 'wash and wear' garments" (*id.* at 8a).

Under Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. 1202, an importer is entitled to a partial duty allowance for:[1]

> Articles * * * assembled abroad in whole or in part of fabricated components, the product of the United States, which * * * (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.

Pursuant to authority conferred on the Secretary of the Treasury "to issue rules and regulations governing the admission of articles under the provisions of the schedules" (19 U.S.C. 1202 (1982), General Headnote 11), the Treasury has specified by regulation that "[a]ny significant process, operation, or treatment other than assembly whose primary purpose is the * * * physical or chemical improvement of a component * * * shall not be regarded as incidental to the assembly" and therefore does not qualify for the duty exemption. 19 C.F.R. 10.16(c). Under this standard, the duty exemption is specifically not available when any "[c]hemical treatment" has been applied to "articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles" (19 C.F.R. 10.16(c)(4)).

---

[1] Pursuant to 19 U.S.C. 3004, the Harmonized Tariff Schedule of the United States (HTSUS) was implemented into law on January 1, 1989. The HTSUS supplanted the former provisions of the Tariff Schedule of the United States (TSUS) on that date. Item 807.00 of TSUS, which applied prior to January 1, 1989, is identical to Subheading 9802.00.80 of HTSUS. References in this brief to Subheading 9802.00.80 of HTSUS thus apply equally to Item 807.00 of TSUS.

The "permapressing" that Haggar applied to the garments in Mexico thus disqualified them from duty-free reentry under the direct text of the regulations. Haggar paid the required duties and then brought this refund suit in the United States Court of International Trade (Pet. App. 7a, 9a).

2. The United States Court of International Trade has exclusive jurisdiction to review protests from Customs Service determinations. 28 U.S.C. 1581(a). The court rejected the Customs Service determination in this case and directed that the duties be refunded to Haggar (Pet. App. 7a-24a, 25a-26a).

a. The Court of International Trade rejected the government's position that 19 C.F.R. 10.16(c)(4) controls this case. The court stated that the regulation is inconsistent with the "plain language" of the statute, which "does not prohibit operations which merely *impart new characteristics* to the article being assembled as the regulation provides, but in fact permits a duty allowance for such improvements to the articles so long as the operation imparting those characteristics was incidental to assembly" (Pet. App. 23a). The court rejected the agency's assertion that its regulatory interpretations of the Tariff Act are entitled to deference under this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). The court stated that the Federal Circuit has "declin[ed] to apply *Chevron* deference to Customs in routine classification decisions" (Pet. App. 23a, citing, *e.g.*, *Crystal Clear Industries* v. *United States*, 44 F.3d 1001, 1003 (Fed. Cir. 1995)) and has even "ignored the regulation altogether" (Pet. App. 23a, citing *Chrysler Corp.* v. *United States*, No. 95-1366, 1996 WL 132263, at *2 (Fed. Cir. Mar. 22, 1996), cert. denied, 519 U.S. 823 (1996); *General Motors Corp.* v. *United States*, 976 F.2d 716, 718 (Fed. Cir. 1992); *United States* v. *Oxford Industries, Inc.*, 668 F.2d 507 (C.C.P.A. 1981); *United States* v. *Mast Industries, Inc.*, 668 F.2d 501, 506 (C.C.P.A. 1981)).

The court explained that it would not give deference to the agency's regulations under the Tariff Act because 28 U.S.C. 2643(b) directs the Court of International Trade "to reach the correct decision" in the cases that come before it. The court stated that this "statutory obligation to find the correct result limits the court's ability to give special *Chevron* deference" to the Treasury regulations issued under the Tariff Act (Pet. App. 23a-24a, quoting *Anval Nyby Powder AB* v. *United States*, 927 F. Supp. 463, 469 (Ct. Int'l Trade 1996)), aff'd, No. 96-1438, 1998 WL 638028 (Fed. Cir. Sept. 11, 1998).

b. Having thus rejected any role for the agency's regulations in interpreting the highly detailed classifications contained in the Tariff Act, the court found it necessary to apply a set of judicially created factors to determine *de novo* whether Haggar's permapressing operation is "incidental to the assembly process" and therefore within the scope of the duty exemption provided in Subheading 9802.00.80 of the Harmonized Tariff Schedule. As a source for such judicially-created factors, the court looked to the decision of the Federal Circuit in *United States* v. *Mast*, 668 F.2d at 506 & n.7. In *Mast*, the Federal Circuit held that, in determining whether a process is "incidental to assembly" for purposes of the tariff exemption, courts should consider (i) whether the cost and time required by the ostensibly "incidental" operation "may be considered 'minor'" compared to the cost and time "required for assembly of the whole article," (ii) whether the operation is "necessary to the assembly process," (iii) whether the

operation is "so related to assembly that [it was] logically per- formed during assembly, and (iv) whether "economic or other practical considerations dictate that the operations be performed concurrently with assembly" (Pet. App. 11a-12a). See also *General Motors Corp.* v. *United States*, 976 F.2d 716 (Fed. Cir. 1992).

Upon reviewing the evidence and "balancing the relevant factors," the Court of International Trade concluded that the permapressing operation is "'incidental to the assembly process' within the meaning of * * * subheading 9802.00.80, HTSUS" (Pet. App. 21a). The court acknowledged that some of the relevant "factors weigh against granting a duty allowance" because they reflect that permapressing is not merely a "minor" adjunct to the assembly process (*id.* at 18a). For example, permapressing entails substantial additional capital costs (*ibid.*) and takes up approximately one-third of the total time involved in the foreign processing of the garments (*id.* at 19a). The court also agreed with the agency that permapressing procedures are "not necessary, nor related to assembly" (*ibid.*). The court nonetheless emphasized that, "to minimize damages and economic costs," permapressing "would logically occur" at the time of assembly (*id.* at 21a). Because "economic and practical considerations dictate" that permapressing occur "concurrent with assembly," the court concluded that the permapressing operation was "incidental to the assembly process" within the meaning of the statutory duty exemption (*ibid.*).

3. The Federal Circuit has exclusive jurisdiction to review the final decisions of the Court of International Trade. 28 U.S.C. 1295(a)(5). On appeal from the decision in this case, the Federal Circuit affirmed (Pet. App. 1a-4a).

The court of appeals held that the Court of International Trade had properly ignored the agency's regulations and had correctly applied the *Mast* factors in determining that the permapressing of the Haggar slacks was "incidental to the assembly process" and therefore within the customs exemption (Pet. App. 3a). The court of appeals concluded that the Treasury regulations interpreting customs classifications are legally irrelevant and are entitled to no weight (*id.* at 3a-4a):

> [T]he [trial] court properly rejected the United States' argument that Customs' regulations interpreting and applying this statute are entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). As we have recently held in several cases, the United States' argument is without merit. *See Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997) (no *Chevron* deference applies to classification decisions); *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491-93 (Fed. Cir. 1997) ("neither this court nor the Court of International Trade defers to Custom's [*sic*] interpretation of a tariff heading on the basis of special deference pursuant to [*Chevron*]").

The court of appeals reasoned that the Treasury regulations are not entitled to the deference required by *Chevron* because "the Court of International Trade is * * * charged with the duty to 'reach the correct decision'" in the cases within its jurisdiction under 28 U.S.C. 2643(b) (Pet. App. 4a, quoting *Rollerblade, Inc.* v. *United States*, 112 F.3d 481, 484 (Fed. Cir. 1997)).

SUMMARY OF ARGUMENT

1. This Court has consistently held that courts are to defer to the formal interpretation of a statute adopted by the agency that has been "charged with responsibility for administering the provision" by Congress. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). The court of appeals erred in holding that "Customs' regulations interpreting and applying [the Tariff Act] are [not] entitled to deference under *Chevron*" (Pet. App. 3a). The sole justification offered by the court for its holding is that 28 U.S.C. 2643(b) authorizes the Court of International Trade to "order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision" in adjudicating a customs dispute. Nothing in that procedural statute plausibly justifies a departure from the rule of deference to agency interpretations required by this Court's consistent decisions. Congress gave the Treasury the responsibility for implementing the Tariff Act and, in particular, delegated authority to that agency "to issue rules and regulations governing the admission of articles under the provisions of the tariff schedule" (19 U.S.C. 1202, General Note 20 of HTSUS). Any ambiguity in this statute is thus to "be resolved, first and foremost, by the agency," and courts are to "accord deference to [the agency's interpretation] under *Chevron*" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996)).

2. The regulation involved in this case constitutes a reasonable interpretation of ambiguous statutory text and therefore "must be sustained" (*Commissioner* v. *Portland Cement Co.*, 450 U.S. 156, 169 (1981)). The Tariff Act confers a customs exemption for certain

articles assembled abroad that have "not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process" (19 U.S.C. 1202, Subheading 9802.00.80 of the HTSUS). Nothing in the plain text of that proyision specifies the precise contours of the statutory exemption for "operations incidental to the assembly process." Drawing on the examples contained in the statute and in its history, however, the agency has interpreted the exemption to be unavailable for "[a]ny significant process, operation, or treatment other than assembly" that has as its "*primary purpose*" the "physical or chemical improvement of a component" (19 C.F.R. 10.16(c) (emphasis added)). The regulation specifies that the chemical treatment of cloth to "impart new characteristics, such as * * * permapressing" is an example of a "significant process" that does not qualify for the statutory exemption because it has the "primary purpose" of improvement rather than assembly (*ibid.*).

That regulatory determination finds ample support in the facts of this case. As the courts below recognized, "permapressing" (i) is neither necessary nor related to the assembly of garments, (ii) effects a significant improvement of the garments and (iii) consumes a substantial portion of the time and capital required in the foreign operations (Pet. App. 18a-21a). Even if some other viewpoint could also be defended as "reasonable," the conclusion in the regulation that permapressing is not merely "incidental" to assembly cannot itself be said to be "unreasonable" and therefore must be sustained. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 842-844.

ARGUMENT

I. THE REGULATIONS ISSUED BY THE TREASURY DEPARTMENT UNDER THE TARIFF ACT ARE ENTITLED TO DEFERENCE IN DETERMINING THE PROPER TARIFF CLASSIFICATION OF IMPORTED GOODS.

1. It has long been a bedrock legal principle that courts are to accord deference to the formal interpretations of a statute adopted by the agency that has been "charged with responsibility for administering the provision" by Congress. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering."); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921); *Brown* v. *United States*, 113 U.S. 568, 570-571 (1885); *United States* v. *Pugh*, 99 U.S. 265, 269 (1878); *Edwards's Lessee* v. *Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827). The deference this Court has consistently accorded to agency interpretations in decisions such as *Chevron* is fully applicable here.

The regulations involved in this case were issued pursuant to the express delegation by Congress of authority to the Secretary of the Treasury "to issue rules and regulations governing the admission of articles under the provisions of the [tariff] schedules." 19 U.S.C. 1202 (1982), General Headnote 11 of TSUS.[2] We

[2] General Note 20 of HTSUS contains similar language. See note 1, *supra*. Congress has specified that "[t]he Customs Service shall, under rules and regulations prescribed by the Secretary,"

"have before us here a full-dress regulation, issued by the [Commissioner of Customs, with the approval of the Secretary of the Treasury,] and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 741).[3] Courts are to defer to the agency's interpretation in this setting "because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Id.* at 740-741.

This Court has frequently emphasized that substantial deference is owed to the formal Treasury regulations that interpret the highly complex and detailed revenue laws: "the task that confronts us is to decide, not whether the Treasury regulation represents the best interpretation of the statute, but whether it represents a reasonable one." *Atlantic Mutual Ins. Co.* v. *Commissioner*, 118 S. Ct. 1413, 1418 (1998). Accord *Cottage Savings Ass'n* v. *Commissioner*, 499 U.S. 554, 560-561 (1991). This high degree of deference to Treas-

determine "the final appraisement of merchandise" and "fix the final classification and rate of duty applicable to such merchandise" (19 U.S.C. 1500(a), (b)). In enacting the HTSUS in 1988 (see note 1, *supra*), the Conference Report emphasized that "[t]he Customs Service will be responsible for interpreting and applying the [Harmonized Tariff Schedules of the United States]" (H. R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549-550 (1988)).

[3] Treasury Department Order No. 165, T.D. 53160 (Dec. 15, 1952), provides that regulations under the Tariff Act "shall be prescribed by the Commissioner of Customs, with the approval of the Secretary of the Treasury."

ury regulations serves the important function of enhancing consistency and predictability in the application of the often intricate and intertwined revenue provisions that shape, and indirectly govern, virtually all forms of economic activity. See, *e.g.*, *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979).

By ignoring the duly promulgated regulations in this case, the decision of the court of appeals erodes the authority conferred on the agency by Congress to establish rules and regulations "to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties" (19 U.S.C. 1502(a)). The decision also undermines the traditional role assigned to the Executive Branch in the execution of foreign trade policy. As this Court stated in *Chevron*, 467 U.S. at 865-866:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
>
> When a challenge to an agency construction of a statutory provision * * * really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.

When, as in this case, Congress "left ambiguity" in the statute that it directed the agency to administer, courts are to accord "great deference" (*Udall* v. *Tallman*, 380 U.S. at 16) to the agency's formal interpretations. *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 741.

2. a. In this case, however, the Federal Circuit specifically "rejected the United States' argument that Customs' regulations interpreting and applying [the Tariff Act] are entitled to deference under *Chevron*" (Pet. App. 3a). The court of appeals instead agreed with the Court of International Trade that it was appropriate to "ignore[] the regulation altogether" (*id. at* 23a). The sole rationale offered by these courts for their refusal to give any weight to the applicable Treasury regulations is that 28 U.S.C. 2643(b) directs the Court of International Trade to "reach the correct decision" in the cases within its jurisdiction (Pet. App. 4a, quoting *Rollerblade, Inc.* v. *United States*, 112 F.3d at 484).

That rationale is unpersuasive for two reasons. First, it does not distinguish the Court of International Trade from any other court, for *all* courts are obviously charged with the responsibility of "reach[ing] the correct decision" in the cases that come before them. See note 4, *infra*. Second, the provision on which the court of appeals relies, when read in its entirety, does nothing more than provide various procedural options for the Court of International Trade when that court is not satisfied with the state of the evidentiary record in the case before it. The statute states in its entirety (28 U.S.C. 2643(b)):

> If the Court of International Trade is unable to determine the correct decision on the basis of the

> evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.

This statute obviously does not provide, either in words or by plausible inference, that the traditional rule of deference to agency interpretations has no role in tariff classification disputes.[4] Courts that properly apply the traditional rule of deference *do* "reach the correct

[4] The Hobbs Act, which governs judicial review of orders from several independent federal regulatory agencies, contains an analogous provision that details the procedural options available to a reviewing court to supplement the evidentiary record. See 28 U.S.C. 2347. The courts that review agency decisions under the Hobbs Act have consistently followed this Court's mandate in *Chevron* and have deferred to reasonable agency interpretations of ambiguous statutory provisions. See, *e.g.*, *American Trucking Ass'ns* v. *Federal Highway Administration*, 51 F.3d 405, 408 (4th Cir. 1995); *American Mining Congress* v. *United States Nuclear Regulatory Commission*, 902 F.2d 781 784 (10th Cir. 1990); *CSX Transportation* v. *United States*, 867 F.2d 1439, 1442 (D.C. Cir. 1989).

The Administrative Procedure Act (APA) applies generally to federal agency practice and procedure. That statute directs the reviewing courts to "decide all relevant questions of law" and to "interpret * * * statutory provisions." 5 U.S.C. 706. Under the reasoning applied by the Federal Circuit in this case, that statute would arguably provide an even more authoritative basis than 28 U.S.C. 2643(b) for a reviewing court to disregard an agency's reasonable statutory interpretations. In judicial review under the APA, however, courts have consistently followed *Chevron* and deferred to agency interpretations of statutes. See, *e.g.*, *Seldovia Native Association* v. *Lujan*, 904 F.2d 1335, 1342 (9th Cir. 1990); *Kansas City Southern Industries, Inc.* v. *Interstate Commerce Commission*, 902 F.2d 423, 430 (5th Cir. 1990).

decision," and those that fail in that responsibility do not.

The legislative history confirms what the language of the statute unambiguously shows: 28 U.S.C. 2643(b) is concerned only with the procedural remedies available to the Court of International Trade when a factual record is inadequate. See H.R. Rep. No. 1235, 96th Cong., 2d Sess. 60 (1980).[5] Nothing in the text or history of this statute provides support for the extraordinary conclusion of the court of appeals (Pet. App. 4a) that, in customs cases, the Court of International Trade need not—and should not—adhere to the decision of this Court in *Chevron*.[6] Indeed, prior to the recent Federal Circuit decisions to the contrary, the Chief Judge of the Court of International Trade had

[5] The House Report states (H.R. Rep. No. 1235, *supra*, at 60):

> Subsection (b) is a new provision that empowers the Court of International Trade to remand the civil action before it for further judicial or administrative proceedings. In granting this remand power to the court, the Committee intends that the remand power be co-extensive with that of a federal district court. In addition, this subsection authorizes the court to order a retrial or rehearing to permit the parties to introduce additional evidence.

[6] Respondent errs in relying (Br. in Opp. 23) on *Jarvis Clark Co.* v. *United States*, 733 F.2d 873 (Fed. Cir. 1984). That decision explains that the statutory directive that the Court of International Trade "order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision" (28 U.S.C. 2643(b)) was enacted to overcome the "dual burden of proof" doctrine that had required importers to show that the government's proposed tariff rate was wrong and also to establish "the proper alternative classification." 733 F.2d at 876. That explanation of Section 2643(b) provides no support whatever for respondent's contention that the statute authorizes the courts to decline to give deference to the agency's regulations.

acknowledged that that court, like all others, "must defer to the agency's interpretation of the statute" if it is "sufficiently reasonable," even though "the court might have reached a different result on its own" (Chief Judge Edward D. Re, *Litigation Before the United States Court of International Trade*, 19 U.S.C.A. §§ 1-1300, at XLI (West Supp. 1998)).[7]

b. No plausible alternative rationale has been offered to justify stripping Treasury regulations under

[7] It is only recently that the Federal Circuit has held that, in enacting 28 U.S.C. 2643(b), Congress directed the courts to give no weight to Treasury interpretations of the Tariff Act. That conclusion first appeared as dicta in *Crystal Clear Indus.* v. *United States*, 44 F.3d at 1003 n.*. It has now been adopted and applied in a number of customs cases. See, *e.g.*, *IKO Industries* v. *United States*, 105 F.3d 624, 626 (Fed. Cir. 1997); *Rollerblade, Inc.* v. *United States*, 112 F.3d 481, 483 (Fed. Cir. 1997); *Universal Electronics, Inc.* v. *United States*, 112 F.3d 488, 491 (Fed. Cir. 1997); *Better Home Plastics Corp.* v. *United States*, 119 F.3d 969, 971 (Fed. Cir. 1997); *Midwest of Cannon Falls, Inc.* v. *United States*, 122 F.3d 1423, 1426 (Fed. Cir. 1997); *Sharp Microelectronics Technology, Inc.* v. *United States*, 122 F.3d 1446, 1449 (Fed. Cir. 1997); *Anhydrides & Chemicals Inc.* v. *United States*, 130 F.3d 1481, 1486 (Fed. Cir. 1997). In each of these decisions, the Federal Circuit has repeatedly relied on the theory that the statutory directive that the Court of International Trade is to "reach the correct result" (28 U.S.C. 2463(b)) trumps the traditional deference owed to agency interpretations.

Paradoxically, the Federal Circuit continues to accord *Chevron* deference to Treasury interpretations of the Tariff Act in customs *valuation* cases. *Goodman Mgf., L.P.* v. *United States*, 69 F.3d 505, 508 (Fed. Cir. 1995). In *IKO Industries* v. *United States*, 105 F.3d at 626, the Federal Circuit distinguished those cases on the ground that they "did not involve a classification dispute but rather a dispute regarding the proper valuation." This describes rather than explains the court's inconsistency in establishing an artificial and untenable distinction between the two "traditional categor[ies] of [customs] litigation" (Re, *supra*, at XXIV).

the Tariff Act of the deference accorded to all other regulations. In its brief in opposition to the petition for a writ of certiorari, respondent sought to raise a variety of new theories that the court of appeals has not itself endorsed.[8] In particular, respondent urged (Br. in Opp. 24) that a "series of provisions" governing judicial review of Customs Service determinations has some role in determining whether deference is due to the agency's regulations. In addition to 28 U.S.C. 2643(b), on which the court of appeals relied, respondent suggests that 28 U.S.C. 2638, 2639(a)(1), and 2640(a)(1) are also somehow relevant to this inquiry. Respondent fails, however, to identify any specific language in any of these additional statutory provisions that addresses the degree of deference to be given to Customs Service interpretations of the Tariff Act.

Section 2638 allows a party seeking review of a tariff protest denial to raise "any new ground in support of the civil action" challenging a Customs Service decision, so long as certain conditions are present. Section 2639(a)(1) states that the agency's denial of a protest "is presumed to be correct." Section 2640(a) directs the

[8] For example, respondent asserts that the decision of this Court in *Morill* v. *Jones*, 106 U.S. 466 (1882), is "relevant precedent" (Br. in Opp. 23). Respondent fails, however, to offer any explanation of *how* that decision is relevant. In fact, it is not. The *Morill* decision stands for the unexceptional proposition that "[t]he Secretary of the Treasury cannot by his regulations alter or amend a revenue law." 106 U.S. at 467. That holding is, of course, consistent with the established rule that, when Congress has "left ambiguity in a statute meant for implementation by an agency," there is "a presumption that Congress * * * understood that the ambiguity would be resolved, first and foremost, by the agency" rather than by the courts. *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 740-741.

Court of International Trade to "make its determinations upon the basis of the record made before the court * * * ." None of these provisions has any application to the dispute presented in this case, and the courts below did not invoke or in any manner seek to rely on them. These additional statutory provisions that respondent now urges as an alternative basis for the decision in this case were not even cited by the courts below and they fail to provide any support for the proposition that the agency's regulations "are [not] entitled to deference under *Chevron*" (Pet. App. 3a).

c. The Court of International Trade, like the Tax Court and other specialized tribunals, has a narrow jurisdiction within which it possesses a presumed expertise. It is well established, however, that deference is owed to agency regulations in these specialized federal courts as well as in federal courts of general jurisdiction. Re, *supra*, at XLI. See, *e.g.*, *Mapco Int'l, Inc.* v. *FERC*, 993 F.2d 235, 239 (Temp. Emer. Ct. App. 1993); *Square D Co.* v. *Commissioner*, 109 T.C. 200, 225 (1997); *Alumax Inc.* v. *Commissioner*, 109 T.C. 133, 192 (1997); *Wright* v. *Gober*, 10 Vet. App. 343, 351 (1997); *Davis* v. *Brown*, 10 Vet. App. 209, 213 (1997). Indeed, it is precisely in cases involving such specialized tribunals that this Court has frequently emphasized that "the task that confronts us is to decide, not whether the Treasury regulation represents the best interpretation of the statute, but whether it represents a reasonable one." *Atlantic Mutual Ins. Co.* v. *Commissioner*, 118 S. Ct. at 1418.

Respondent ignores this established precedent in contending that the "specialized" (Br. in Opp. 22) nature of the Court of International Trade allows it to discard as irrelevant the formal regulations adopted by the Treasury under the Tariff Act. The expertise of the

Court of International Trade—like the expertise of other specialized tribunals—should be used to apply the regulations issued by the agency that Congress has "charged with responsibility for administering the provision" (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 865). Contrary to the decision in this case, these specialized courts are not established for the purpose of rewriting or "ignor[ing] the regulation altogether" (Pet. App. 23a). Instead, as this Court emphasized in holding that formal Treasury interpretations of tariff legislation are to be accorded "considerable weight" in customs litigation, such specialized courts as the Customs Court (in that case) are to "show[] great deference to the interpretation given the statute by the officers or agency charged with its administration." *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978), quoting *Udall* v. *Tallman*, 380 U.S. at 16.

3. By denying this customary deference to the Treasury regulations that interpret the detailed classification provisions of the Tariff Act, the Federal Circuit decision in this case would leave both importers and the Customs Service without effective guidance for a wide range of transactions. If the agency's interpretive regulations were deprived of any effect, the ultimate application of customs provisions could not be determined until completion of a cumbersome, case-by-case inquiry to obtain an ad hoc judicial "balancing [of] the relevant factors" (Pet. App. 21a). Moreover, as the Federal Circuit has acknowledged, the list of the "relevant factors" to be applied in such judicial proceedings may vary from situation to situation. *General Motors Corp.* v. *United States*, 976 F.2d at 720. Since the "balancing" of such "relevant factors" is an inherently subjective inquiry, it is obvious that different

triers of fact could reach different results on similar sets of facts. For example, two permapressing operations, even if descriptively similar, could yield different tariff results depending upon whether or not "economics and practicality dictate" that "the curing of the fabric would logically occur * * * concurrent with assembly" (Pet. App. 21a). The result of the ad hoc approach adopted in this case and of the court's refusal to give any weight to the agency's interpretive regulations would be expensive customs litigation and unpredictable outcomes. By contrast, judicial deference to the regulations issued by the Customs Service serves the legislative goal of providing "uniform and consistent interpretation and application of the laws involved in disputes arising out of import transactions" (H.R. Rep. No. 1235, *supra*, at 29) and thereby enhances the efficiency of both business planning and customs administration.

If 28 U.S.C. 2643(b) had the meaning adopted by the Federal Circuit in this case, it would be the only instance of which we are aware in which Congress has stripped an agency of the deference to which its interpretations are traditionally entitled. See note 4, *supra*.[9] The unique conclusion reached by the Federal

[9] The Customs Service employs several thousand officers who are responsible for monitoring trillions of dollars of shipments to obtain an annual collection of $22 billion in duties at more than 300 ports of entry. Acting together with importers, these officers must promptly and efficiently make thousands of tariff classification decisions every day. It is most unlikely, in this context, that Congress would have sought to deprive the agency of the ordinary administrative authority to provide prospective guidance to the public and to its own officers by means of the interpretive regulations that Congress authorized the agency to adopt. Nothing in the text or history of the procedural guidelines for judicial review contained in 28 U.S.C. 2643(b) reflects an intent by Congress to adopt the extraordinary departure from normal administrative law principles that the decision below mandates.

Circuit in interpreting this statute has, moreover, been derived from the most modest of statutory texts. See pages 15-16, *supra*. And, in reaching that unique conclusion, the court of appeals failed even to acknowledge or address the "presumption" that Congress intends statutory ambiguities to be "resolved, first and foremost, by the agency" charged with the duty of administering the statute, "rather than the courts" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 740-741). As this Court made clear in *Zenith Radio Corp.* v. *United States*, 437 U.S. at 450, in disputes arising under the Tariff Act, as in disputes arising under other statutory schemes, courts are to show "great deference" to the agency's interpretation of the statute.

II. THE CHALLENGED REGULATION SHOULD BE SUSTAINED AS A REASONABLE INTERPRETATION OF THE TARIFF ACT.

Under the correct standard of deference appropriate for agency interpretations of the "statutes that they are charged with administering" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 739), the regulation should have been sustained. The language employed by Congress in the statutory customs exception for "operations incidental to the assembly process" (Subheading 9802.00.80 of HTSUS, 19 U.S.C. 1202) is not plain and unambiguous. And, the agency's determination that an operation such as "permapressing" is sufficiently distinct from "assembly" that it is *not* "incidental to the assembly process" is reasonable. The agency's formal regulatory interpretation of the statute

should therefore have been upheld under this Court's decision in *Chevron*, 467 U.S. at 842-844.

1. a. Congress has not "directly spoken to the precise question [of statutory construction] at issue" in this case (*Chevron*, 467 U.S. at 842). The statute provides several specific examples of operations that are "incidental to the assembly process such as cleaning, lubricating and painting." Subheading 9802.00.80 of HTSUS, 19 U.S.C. 1202. That list of concrete examples, however, does not address the myriad of other operations that can be performed abroad and does not indicate whether such other operations should be regarded as "incidental to the assembly process." Because Congress "left ambiguity in a statute meant for implementation by an agency," there is "a presumption that Congress * * * understood that the ambiguity would be resolved, first and foremost, by the agency" rather than by the courts. *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 740-741.

The question to be addressed in this case is thus not whether the Treasury regulation "represents the best interpretation of the statute, but whether it represents a reasonable one." *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 744-745.[10] As this Court has frequently emphasized (*Aluminum Co.* v. *Central*

[10] "Under the formulation now familiar, * * * 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'" *NationsBank of N. C., N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995), quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 843.

Lincoln Peoples' Utility District, 467 U.S. 380, 389 (1984)):

> "To uphold [the agency's interpretation] 'we need not find that [its] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' . . . We need only conclude that it is a reasonable interpretation of the relevant provisions." *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 422-423 (1983), quoting *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946).

See also *Udall* v. *Tallman*, 380 U.S. at 16; *Power Reactor Dev. Co.* v. *International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 408 (1961); *Unemployment Compensation Comm'n of Territory of Alaska* v. *Aragon*, 329 U.S. 143, 153 (1946); *Gray* v. *Powell*, 314 U.S. 402, 411 (1941); *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583 (1930).

b. The regulation adopted by the Treasury to clarify application of the customs exception for "operations incidental to the assembly process" is a reasonable elaboration of the statutory scheme. The regulation defines the concept of "assembly operations" to "consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing, or the use of fasteners" (19 C.F.R. 10.16(a)). The regulation then defines operations that are *not* incidental to the assembly process as "[a]ny significant process, operation, or treatment other than assembly" that (i) has the "primary purpose" of "the fabrication, completion, physical or chemical improvement of a component" or (ii) "is not related to the

assembly process" (19 C.F.R. 10.16(c)). To provide more detailed guidance to the public, and to formalize the longstanding administrative position on this issue,[11] the agency listed several specific operations that are deemed *not* to be incidental to assembly under the regulation. Included among those specific examples is the "[c]hemical treatment of components or assembled articles to impart new characteristics, such as shower-proofing, permapressing, sanforizing, dying or bleaching of textiles" (19 C.F.R. 10.16(c)(4)).[12] The agency concluded that the chemical treatment of cloth to "impart new characteristics, such as * * * permapressing," is an example of a "significant process" that does not qualify for the statutory exception because it has the "primary purpose" of improvement and is not related to assembly (*ibid.*).

That regulatory determination finds ample support in the facts of this case. The trial court acknowledged that several "factors weigh against granting a duty allowance" because they reflect that permapressing is not merely a "minor" adjunct to the assembly process (Pet. App. 18a). As the court recognized, "permapressing" (i)

[11] In Headquarters Ruling 027763 (Sept. 13, 1973), the Customs Service determined that permapressing is not an operation incidental to assembly for purposes of Item 807.00 of the TSUS. See note 1, *supra*.

[12] In addition to these examples, the regulation further specifies that garment cutting, decorative painting and metalworking operations are *not* incidental to assembly. 19 C.F.R. 10.16(c)(2), (3), and (5). The regulation identifies some operations that *do* qualify as "incidental to assembly," such as cleaning; rust, grease, and paint removal; application of preservative coatings and trimming and folding. 19 C.F.R. 10.16(b). These examples are consistent with the understanding of the statute expressed in its legislative history. See note 13, *infra*.

is "not necessary, nor related to assembly" of the garments (*id.* at 19a), (ii) effects a significant improvement of the garments (*id.* at 11a) and (iii) is a substantial operation that consumes a significant portion of the time and capital required in the foreign operations (*id.* at 18a-19a). By specifying that such operations are not "incidental" to assembly, the regulation gives effect to the ordinary meaning of the statutory text. A process can be "incidental" to assembly only if it occurs as "a minor concomitant" of the assembly process (*Webster's Third New International Dictionary* 1142 (1976)).[13]

c. The Court of International Trade erred in concluding (Pet. App. 23a) that the agency's regulation conflicts with the plain language of the statute. The court based that conclusion on its assumption that the regulation precludes every operation that "*impart[s] new characteristics*" to an article from being regarded

[13] The legislative history reflects the same understanding of the statute that is expressed in the regulation (H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965) (emphasis added):

> The amended item 807.00 would specifically permit the U.S. component to be advanced or improved "by operations incidental to the assembly process such as cleaning, lubricating, and painting." It is common practice in assembling mechanical components to perform certain incidental operations which cannot always be provided for in advance. For example, in fitting the parts of a machine together, it may be necessary to remove rust; to remove grease, paint, or other preservative coatings; to file off or otherwise remove small amounts of excess material; to add lubricants; or to paint or apply other preservative coatings. It may also be necessary to test and adjust the components. Such operations, *if of a minor nature incidental to the assembly process*, whether done before, during, or after assembly, would be permitted even though they result in an advance in value of the U.S. components in the article assembled abroad.

as "incidental to assembly" (*ibid.*). That assumption is based upon a misreading of the plain text of the regulation.

The regulation does not state, as the lower court suggested, that *any* process that "*impart[s] new characteristics*" to goods cannot be regarded as "incidental to assembly." Instead, the regulation defines "[o]perations not incidental" to the assembly process to include (19 C.F.R. 10.16(c)):

> [a]ny significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process.

The regulation thus excludes from the duty exception only those operations that are "not related to the assembly process" or whose "primary purpose" is "improvement of a component" rather than assembly. Neither of the courts below has suggested that there is any flaw in that general regulatory definition of the statutory concept of operations "incidental" to assembly. Indeed, the language criticized by the Court of International Trade concerning operations that "impart new characteristics" to goods does not even appear in that general definition.

The language criticized by that court appears only in the subsection of the regulation that addresses operations that involve the "[c]hemical treatment of components or assembled articles [of clothing] to impart new characteristics, *such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles*" (19 C.F.R. 10.16(c)(4) (emphasis added)). That language specifies only that such "[c]hemical treatment" of clothing as "permapressing" does not qualify as "incidental"

to assembly under the statute. *Ibid.* The narrow, focused administrative determination that such discrete operations have the "primary purpose" of improving the article and are not merely "of a minor nature incidental to the assembly" (H.R. Rep. No. 342, *supra*, at 49) is neither "unreasonable" nor "plainly inconsistent" with the statute and therefore "must be sustained" (*Commissioner* v. *Portland Cement Co.*, 450 U.S. 156, 169 (1981), quoting *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948)). Even if some other interpretation of the statute could also be defended as "reasonable," the conclusion reached in the regulation cannot itself be said to be "unreasonable" and must therefore be upheld. *Chevron*, 467 U.S. at 842-844.

2. There are, moreover, several factors surrounding the adoption of the regulation that give the agency's interpretation of the statute special weight. First, we "have before us here a full-dress regulation, issued by the [Commissioner of Customs, with the approval of the Secretary of the Treasury,] and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 741). See note 3, *supra*. The Treasury Department conducted this rulemaking proceeding specifically to formulate regulations dealing with "Articles Assembled Abroad with United States Components." 39 Fed. Reg. 24,651 (1974). The final regulations reflect the agency's consideration of the "numerous comments received." 40 Fed. Reg. 43,021 (1975). The agency's regulatory interpretation of the statute was not "prompted by litigation," was not "'wholly unsupported by * * * administrative practice'" and was not accompanied by any other feature that would render the deliberative quality of the regulation "suspect."

Smiley v. *Citibank (South Dakota), N.A.*, 517 U.S. at 741, quoting *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

The statutory customs exception for operations "incidental" to assembly was first enacted by Congress in 1965. Pub. L. No. 89-241, § 85, 79 Stat. 949; see *Williams, Clarke Co.* v. *United States*, 300 F. Supp. 878, 879 (Ct. Cust. 1969), aff'd, 436 F.2d 1039 (C.C.P.A. 1971). By the time that the formal regulation was adopted by the Treasury Department in 1975, the agency's interpretation of the statute had already been presaged by prior consistent administrative practice. See note 11, *supra*. The regulation thus does not reflect the sort of "[s]udden and unexplained change" in the agency's interpretation that, in other contexts, has been a basis for judicial concern. See *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 742; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 295 (1974). To the contrary, "the manner in which it evolved[,] the length of time the regulation has been in effect, the reliance placed on it, [and] the consistency of the [agency's] interpretation" all combine to fortify the presumption of reasonableness that accompanies this longstanding regulation. *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. at 477. As this Court emphasized in upholding another longstanding Treasury ruling that interpreted a different provision of the Tariff Act in *Zenith Radio Corp.* v. *United States*, 437 U.S. at 450, quoting *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933):

> [A]n administrative "practice has peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

The Court has recently emphasized that the formal Treasury regulations that interpret the highly complex and detailed revenue laws are to be given special weight. *Atlantic Mutual Ins. Co.* v. *Commissioner*, 118 S. Ct. at 1418; *Cottage Savings Ass'n* v. *Commissioner*, 499 U.S. at 560-561. Principles of deference to agency interpretations have "particular force" when the subject of the regulation is "technical and complex" and the agency has "longstanding expertise" in the subject of the statute. *Aluminum Co.* v. *Central Lincoln Peoples' Utility Dist.*, 467 U.S. at 390. Especially in view of the "considerable weight" that is to be accorded to the Treasury's "longstanding and consistent administrative interpretation" of tariff legislation, the regulation challenged in this case is "'sufficiently reasonable' to be accepted by a reviewing court." *Zenith Radio Corp.* v. *United States*, 437 U.S. at 450. As Chief Justice Marshall stated for the Court almost 200 years ago, in *United States* v. *Vowell and M'Clean*, 9 U.S. (5 Cranch) 368, 372 (1809), when a question of interpretation of tariff legislation is "doubtful," courts are to "respect[] the uniform construction which it is understood has been given by the treasury department of the United States."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

UNITED STATES OF AMERICA,
Petitioner,

v.

HAGGAR APPAREL COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

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QUESTIONS PRESENTED

1. Whether regulations issued by the Treasury Department under the Tariff Act are entitled to deference in determining the proper tariff classification of imported goods.

2. Whether 19 C.F.R. 10.16(c) reasonably interprets the statutory phrase "operations incidental to the assembly process" in Subheading 9802.80 of the Harmonized Tariff Schedule of the United States to exclude the "permapressing" of items of clothing assembled abroad.

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INTRODUCTION

The United States presents this case as a syllogism. Agencies with rulemaking authority get *Chevron* deference; Customs is such an agency; therefore the Customs' rule at issue here deserves *Chevron* deference.

We agree that this case may be readily resolved, but not in Customs' favor. In a provision aptly entitled "Scope and Standard of Review," Congress specifically addressed the scope and standard of judicial proceedings in each of the civil actions subject to the jurisdiction of the Court of International Trade. 28 U.S.C. § 2640. There, and in surrounding, related provisions, Congress made clear that, in tariff classification cases, the scope of review is not limited to the administrative record and that the standard of review is accordingly not deferential but *de novo*. The legislative history of these provisions, repeated written presentations to Congress by the Department of Justice, and two centuries of practice confirm what the statutory provisions set forth on their face: challenges to Customs' tariff classifications are to be reviewed *de novo* in federal court. This fact alone is dispositive, because it is settled law that, when Congress provides for *de novo* review in the federal courts, *Chevron* deference does not apply.

While Congress' imposition of a *de novo* standard is, by itself, enough to decide this case, there is much more to support the judgments below. Most notably, the excerpts of statutes and legislative history on which the United States selectively relies for Customs' supposed rulemaking authority, when examined in context, demonstrate uniformly that Congress did not give Customs, and Customs never understood itself to have, authority to issue substantive rules concerning tariff classifications that would bind litigants in classification disputes. Customs has historically been, and today remains, quintessentially an enforcement agency, and it intended its interpretive tariff classification rules to bind only its own officers, not the courts.

The Solicitor General's syllogism thus ignores not only those

statutory provisions that bear most directly on the question presented, but also the broader statutory, regulatory, and historical context in which any assertion that Customs is entitled to deference in this matter should be considered. We therefore begin with a brief historical summary of the longstanding right of importers to bring civil actions in federal court to challenge Customs' classifications of goods. We also briefly describe Customs' limited role in implementing the trade policy of the United States, and then summarize the proceedings in this case.

STATEMENT OF THE CASE

A. Civil Actions To Contest Customs' Classifications

1. The First 100 Years – The Right To A Jury Trial

Throughout the nation's first 100 years, with the exception of one significant 36-day interval discussed below, importers enjoyed the right to challenge the classification of goods by a customs official by instituting a civil jury trial in either federal or state court in which all questions of fact and law were adjudged *de novo*. The second statute that Congress passed, the Act of July 4, 1789, ch. 2, 1 Stat. 24, set forth a tariff schedule and imposed duties on imported goods. The lower courts quickly recognized (as English courts previously had), and this Court eventually confirmed, that the common law provided a right of action (in assumpsit) against the collector personally "to recover back an excess of duties paid to him as collector" in light of an erroneous classification. *Elliot* v. *Swartwout*, 35 U.S. (10 Pet.) 137, 158 (1836); see *Campbell* v. *Hall*, 98 Eng. Rep. 1045 (King's Bench 1774) (Lord Mansfield).

This exposure to personal liability led most collectors to hoard, and some to embezzle, contested duties. Congress responded with the Act of March 3, 1839. This Act required that collectors pay disputed sums to the United States Treasury, and required the Secretary of the Treasury to refund any duties later found to have been erroneously collected. *Id.* ch. 82, § 2, 5 Stat. 339, 348-49. In *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 239-52 (1845), this Court construed the Act to eliminate the common law right of action against the collector, and held that

the power to resolve customs disputes now rested exclusively with the Secretary of the Treasury.

Justices Story and McLean dissented. They argued that Congress intended only that the Secretary hold the disputed funds during litigation, not that litigation be eliminated. Justice Story's assessment of the need for *de novo* judicial review in classification disputes is strikingly apt to the classification dispute now before this Court:

> [G]rave controversies must always exist (as they have always hitherto existed) as to the category within which particular fabrics and articles are to be classed. The line of discrimination between fabrics and articles approaching near to each other in quality, or component materials, or commercial denominations, is often very nice and difficult, and sometimes exceedingly obscure. It is the very case, therefore, which is fit for judicial inquiry and decision . . . .
>
> Besides, we all know that, in all revenue cases, it is the constant practice of the secretary of the Treasury to give written instructions to the various collectors of the customs as to what duties are to be collected under particular revenue laws, and what, in his judgment, is the proper interpretation of those laws. . . . Of what use then, practically speaking, is the appeal to him, since he has already given his decision? Further, it is well known, and the annals of this court as well as those of the other courts of the United States establish in the fullest manner, that the interpretations so given by the secretary of the Treasury have, in many instances, differed widely from those of the courts. The Constitution looks to the courts as the final interpreters of the laws.

44 U.S. (3 How.) at 256-57.

Justice Story's dissent was quickly vindicated. Six days after *Cary* v. *Curtis* was handed down, a bill to restore a right of action against the collector was introduced in the Senate. Cong.

Globe, 28th Cong., 2d Sess. 195 (1845). Thirty days later, Congress enacted the Act of February 26, 1845, ch. 22, 5 Stat. 727, establishing a statutory right to a trial by jury against the collector. See George Stewart Brown, The United States Customs Court I, 19 ABA J. 333, 336 (June 1933).

2. The Second 100 Years -- Trial *De Novo* Before A Specialized Court

By the 1880s, the volume and complexity of customs litigation had overwhelmed the ability of the courts to handle the caseload efficiently and effectively, and lack of uniformity in decisions was of serious concern. Rather than rely on deference to agency decisions, Congress responded by creating specialized trial and appellate courts to handle Customs' cases. See generally *United States* v. *Stone & Downer Co.*, 274 U.S. 225, 232-34 (1927).

Congress began in 1890 by creating a nine-member Board of General Appraisers to hear appeals from decisions of customs officials, with an appeal to federal circuit courts. Act of June 10, 1890, Ch. 407, 26 Stat. 131. In response to strong objections concerning the abolition of the right to a jury trial, the Act provided for "a review of the questions of law and fact" by the federal court, and further permitted the introduction of new evidence before the reviewing court. *Id.* § 15.

One exception to *de novo* review was the appraisal of the value of the imported goods. On this issue of valuation, the Secretary received deference on the facts, because Congress had expressly mandated in the 1890 Act that the appraiser's judgment would "be final, unless the appraisement were in some respects unlawful." *Erhardt* v. *Schroeder*, 155 U.S. 124, 130 (1894); see *Passavant* v. *United States*, 148 U.S. 214, 220 (1893). Nevertheless, this Court refused to defer to "the practice, under instructions issued by the Secretary of the Treasury," to treat certain aspects of "*classification*" as part of the appraisal of the value of the imported goods. *Erhardt*, 155 U.S. at 130-31 (emphasis added). Instead, the Court reaffirmed that, apart from the appraisal, "a party dissatisfied with the classification of imports may apply to the court to have

examined and reviewed *everything* involving the legality of the [collector's] demand." *Id.* at 129 (emphasis added).

In ensuing years, Congress took additional steps to achieve uniformity in the resolution of Customs' disputes by further centralizing judicial review in specialized courts. In 1909, Congress created a specialized appellate court, the Court of Customs Appeals, with exclusive jurisdiction to hear appeals from the Board. Act of August 5, 1909, ch. 6, § 29, 36 Stat. 11, 105-6. In 1926 Congress renamed the Board the United States Customs Court. Act of May 28, 1926, ch. 411, 44 Stat. 669, 669. Congress later conferred Article III status on both courts.[1] The Customs Court reviewed all legal and factual issues in classification cases *de novo*. See, *e.g.*, Tariff Act of 1922, § 514, ch. 356, 42 Stat. 858, 969 (importer may challenge "[a]ll decisions of the collector, including the legality of all orders and findings entering into the same"); *C.J. Tower & Sons* v. *United States*, 33 Cust. Ct. 14, 15 (Cust. Ct. 1954) ("[t]he courts are not influenced by the interpretative rulings made for the guidance of customs officers" in "the construction of the tariff laws"); *American Express Co.* v. *United States*, 39 CCPA 8, 8 (Cust & Pat. App. 1951) ("meaning of a . . . term used in a tariff act is a question of law to be decided by the court").

In 1970, with the United States Customs Court again facing a "rapidly expanding workload," S. Rep. No. 91-576, at 7 (1969), Congress enacted the Customs Courts Act of 1970, Pub. L. No. 91-271, 84 Stat. 274. Among other things, this Act continued to give the Customs Courts exclusive jurisdiction over "the legality of all orders and findings entering into" a classification dispute, 28 U.S.C. § 1582(a) (1970), and permitted the Customs Court to consider "any new ground" in a civil action challenging a tariff classification. *Id.* § 2632(d); See S. Rep. No. 91-575 at 18 (1969).

Nine years later, Congress addressed the standard of review

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[1] Act of Aug. 25, 1958, Pub. L. No. 85-755, § 1, 72 Stat. 848; Act of July 4, 1956, ch. 589, § 1, 70 Stat. 532,532; see *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962).

for antidumping and countervailing duty cases. The Senate Report noted that the state of the law in this area was "unclear and conflicting," S. Rep. No. 96-249, at 251 (1979); two courts in 1979 had concluded that countervailing duty cases should be subject to the same "de novo" standard of review that applied to classification cases. *ASG Indus., Inc.* v. *United States*, 467 F. Supp. 1200, 1231-38 (Cust. Ct. 1979); *Michelin Tire Corp.* v. *United States*, 469 F. Supp. 270, 273-77 (Cust. Ct. 1979). Congress instead provided for deferential review of the administrative record. Tariff Act of 1930, § 516A(b)(1)(B) (as added by the Act of July 26, 1979, Pub. L. 96-29, § 1001(a), 93 Stat. 300), codified at 19 U.S.C. § 1516a(b)(1)(B).

One year later, Congress enacted "a comprehensive system of judicial review of civil actions arising from import transactions" that "clarified and expanded [the] jurisdiction" of the Customs Court and changed its name to the Court of International Trade (CIT). H.R. Rep. No. 96-1235, at 20 (1980); see Customs Court Act of 1980, Pub. L. No. 96-417, § 192(a) 94 Stat. 1727, 1727. Notably, in a provision entitled "Scope and Standard of Review," Congress listed each of the actions over which the CIT had jurisdiction and identified precisely the scope and standard of review applicable to each. For example, Congress preserved the *de novo* standard of review for civil actions challenging classifications, and similarly confirmed that challenges to countervailing duties would be subject to deferential review of the administrative record. 28 U.S.C. §§ 1581(a), 2640(a), (c); 19 U.S.C. § 1515. Similarly, as discussed further below, Congress declined the repeated request of DOJ to restrict the CIT to deferential administrative review of advance rulings concerning classifications. 28 U.S.C. § 1581(h). In seeking deferential review for advance rulings, DOJ repeatedly emphasized that it was not suggesting that Congress make any change to the "sweeping" standard of "de novo" review that applies to protests of classifications. See pages 19-20, *infra*.

B. The Role of Customs In United States Trade Policy

The regulations for which the United States now seeks *Chevron* deference interpret provisions of the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202. That schedule is the successor to the Tariff Schedule of the United States (TSUS), which originally was drafted by the United States Tariff Commission and adopted by Congress in 1962. Tariff Classification Act of 1962, Pub. L. No. 87-456, 76 Stat. 72. Congress has expressly delegated responsibility for publishing the HTSUS, and for making recommendations for its modification, not to the Secretary of the Treasury, but to the successor to the drafting agency, the United States International Trade Commission ("ITC"). See 19 U.S.C. §§ 3002(1), 3005, 3007. The recommendations for modifications are then to be reviewed by the President, who has the power to "proclaim modifications" to the HTSUS that are presented to Congress for review during a 60-day "lay-over period." *Id.* § 3006(b)(1).

The President, in turn, has delegated his authority to submit reports recommending modifications to Congress under § 3006, not to the Secretary of the Treasury, but to the United States Trade Representative ("USTR"). Memorandum of Dec. 12, 1991, 56 Fed. Reg. 65413. Such delegation is consistent with Congress' decision to make the USTR "responsible for coordination of United States trade policy in relation to the [International] Convention [on the Harmonized Commodity Description and Coding System]," see 19 U.S.C. §§ 3002(2), 3009, as well as to subordinate the work of the Treasury and Commerce Departments and the International Trade Commission to the "policy direction of the Office of the United States Trade Representative . . . with respect to the activities of the Customs Cooperation Council relating to the Convention." *Id.* § 3010(a)(1). See also *id.* § 2171 (listing the broad responsibilities and powers of the USTR to formulate and coordinate trade policy). It is thus the President (USTR), on the recommendation of the ITC, to whom Congress delegated

authority to modify the very language that Customs now claims to have been given definitive authority to interpret.

Congress has not granted Customs comparable authority. As the agency responsible for enforcing the tariff schedules, Customs has been given authority to make rules that bind and bring uniformity to the hundreds of daily judgments made by scores of customs officers at the various ports of entry. See pages 30-31, *infra*. Notably, the legislative history to Headnote 11 of the TSUS makes clear that the United States Tariff Commission (which drafted the Headnote as well as the Tariff Schedule) understood that Customs' role was limited to enforcing the provisions uniformly across the various ports of entry. See pages 31-33, *infra*. Customs then confirmed its own understanding of and acquiescence in this limited role when, in the very interpretive regulations in question, it disavowed any intent to bind anyone other than Customs officers:

> The definitions and regulations that follow are promulgated to *inform the public* of the constructions and interpretations that *the United States Customs Service* shall give to relevant statutory terms *and to assure the impartial and uniform assessment* of duties upon merchandise claimed to be partially exempt from duty under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (19 USC § 1202), *at the various ports of entry*. *Nothing* in these regulations purports or *is intended to restrict* the legal right of importers or others to a judicial review *of the matters contained therein*.

19 C.F.R. § 10.11(a) (emphasis added). This disclaimer is consistent with Customs' historic role as an enforcement agency, with agents who have express power to carry firearms, execute search and arrest warrants, and "perform any other law enforcement duty" the Secretary may assign them, see 19 U.S.C. § 1589a, and with reporting responsibilities within Treasury assigned to the Assistant Secretary for Enforcement.

See Office of the Federal Register, National Archives and Records Administration, *United States Gov't Manual* 449-50 (1997-98).

C. Proceedings Below

Respondent Haggar Apparel Company designs, manufactures, imports, and markets a wide variety of men's apparel products. Respondent filed this civil action on July 21, 1993, to contest Customs' decision to assess a substantial duty on certain permanent press trousers. Pet. App. 9a-10a.

Permanent press garments are those that maintain a smooth, wrinkle-free appearance, with sharp pleats and creases, after they have been washed and worn and without ironing or pressing. J.A. 31, ¶ 17. Garments made purely of cotton, untreated with chemicals, cannot achieve these characteristics. *Id.* at 31-32, ¶ 20. The permanent press garments in this case were made either entirely of synthetic fiber, or of a blend of natural and synthetic fiber. *Id.* at 31, ¶ 17. If a blend is used, the fabric must first be "chemically treated" by being impregnated with resins. *Id.* at 31-32, ¶ 20. All of the fabrics at issue in this case were chemically treated in the United States. *Id.* at 37, 38, ¶¶ 47, 54.

In addition to the use of synthetic or blended fabrics, "[s]ome regulated heat process is necessary" to achieve the permanent press characteristics. J.A. 33, ¶ 24. That heating process, known as "curing," involves "pressing" the garments and, in some instances, also can involve baking them in an oven. *Id.* All of the fabrics at issue underwent "the same pressing and assembly process" in Mexico. Pet. App. 8a.

The garments at issue in this case are men's trousers, model number 245, that were manufactured in the United States and assembled in Mexico at Haggar's subsidiary. J.A. 29, 31, ¶¶ 5, 9, 19. For these trousers, Haggar used three fabric types. One was an all-synthetic blend, which "require[s] pressing, but do[es] not require resin treatment or baking," to acquire permanent press characteristics. Pet. App. 8a; J.A. 48. A second fabric type was a blend of cotton and polyester that was heated and

thus "pre-cured" at the textile mill in the United States. J.A. 35, ¶¶ 33, 34.

The third fabric, also a blend, was post-cured in Mexico "by pressing and ovenbaking." J.A. 37, ¶ 42. For this fabric, the pressing "begins the curing process" that ovenbaking completes. Pet. App. 16a. Ovenbaking involves "load[ing]" the assembled trousers on a conveyer belt and baking them in an oven for a period of 12 to 15 minutes. *Id.* at 8a; J.A. 33, ¶ 26. In lieu of ovenbaking, the curing process could have been completed by continuing to press the garments for an additional two to three minutes. J.A. 57. Because ovenbaking "is an automatic process" that, for Haggar, involved equipment that was "fully depreciated," it was less expensive than further pressing. Pet. App. 18a, 19a; J.A. 41-42, 57; Tr. at 79-87.

Customs granted a duty allowance under TSUS 807.00 and HTSUS 9802.00.80 for the trousers that were assembled from all-synthetic or pre-cured fabric. J.A. 35, ¶ 34. Customs denied an allowance, however, for the trousers assembled from post-cured fabric.

The CIT, "in a thorough opinion by Chief Judge DiCarlo," Pet. App. 2a, overturned Customs' decision. *Id.* at 7a-24a. The CIT framed the "dispositive issue" in the case as "whether oven-baking is an operation incidental to assembly." *Id.* at 11a. The court included pressing in its analysis because pressing "begins the curing process which, once started, imparts permanent new characteristics to the pants." *Id.* at 16a.

The CIT then compared the pressing and ovenbaking operations with the assembly process that preceded them, using criteria set forth in *United States* v. *Mast Industries, Inc.*, 668 F.2d 501 (C.C.P.A. 1981). Pet. App. 17a-21a & n.1. The CIT determined that the cost of pressing and baking as compared to assembly was minor. *Id.* at 17a, 21a. The court also determined that, although the ovenbaking operation was "unrelated to assembly," *id.* at 19a, "strong economic and practical considerations dictate that curing be performed concurrently with assembly." *Id.* at 21a. The court therefore concluded that

the curing operation was "incidental to the assembly process" within the meaning of the statute. *Id.*

The CIT then rejected the government's argument that the duty allowance should be denied because the garments "had undergone a prohibitory advancement in value." Pet. App. 22a. The court explained that the plain language of the statute "does not prohibit an advancement in value, therefore, so long as the operation in question is incidental to assembly." *Id.*

For similar reasons, the CIT rejected Customs' argument that 19 C.F.R. § 10.16(c) governs the application of the statute. The CIT held that this regulation "conflicts with the plain language of item 807.00" because it classifies as non-incidental those operations "'whose primary purpose is the fabrication, completion, physical or chemical improvement of a component,'" Pet. App. 22a (quoting § 10.16(c)), whereas the statute "does not prohibit operations which merely *impart new characteristics* to the article being assembled as the regulation provides, but in fact permits a duty allowance for such improvements . . . so long as the operation imparting those characteristics was incidental to assembly." *Id.* at 23a (emphasis in original).

Finally, the court determined that Customs' regulation was not entitled to deference under this Court's opinion in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Customs never argued that its regulations applied or merited *Chevron* deference until the court requested briefing of the issue during post-trial briefing. J.A. 9, Dkt. Nos. 54, 55. The Court then rejected the government's argument based on Federal Circuit authority. Pet. App. 23a-24a.

The government appealed and the Federal Circuit affirmed. Pet. App. 1a-4a. The court of appeals agreed with the CIT's *Mast* analysis "of the curing operation," and affirmed its analysis that "the statute does not prohibit advancement in value where the operation in question is incidental to the assembly process." *Id.* at 3a. The court of appeals also rejected the government's claim for *Chevron* deference, relying on two of its recent

holdings, including *Universal Electronics Inc.* v. *United States*, 112 F.3d 488 (Fed. Cir. 1997). Notably, in that case, also a classification dispute, the court of appeals explained:

> The Court of International Trade does not defer to Customs' decisions because *it has been tasked by Congress to conduct a de novo review*, and to determine the correct classification *based on the record made before it. See 28 U.S.C. §§ 2640(a)*; 2643(b).

Id. at 493 (emphasis added).

SUMMARY OF ARGUMENT

I

Congress expressly and dispositively resolved the first question presented when, in 1980, it preserved the right of importers to challenge Customs' tariff classifications in a trial *de novo* in federal court. In section 301 of the Customs Courts Act of 1980, 28 U.S.C. § 2640, Congress expressly made choices about the scope and standard of review for each of the civil actions over which the CIT has jurisdiction. For some of these actions, Congress chose to grant review only on the basis of the administrative record in accordance with Administrative Procedure Act standards. See 28 U.S.C. §2640(b)-(e). For others, including "[c]ivil actions contesting the denial of a protest [of a classification] under section 515 of the tariff Act of 1930," Congress provided for review "upon the basis of the record made before the court," *id.* § 2640(a), which may include "any new ground in support" of the civil action, *id.* § 2638, as well as new "evidence" and "witnesses," *id.* § 2641. Moreover, the CIT's decision must be supported by "findings of fact and conclusions of law" or by "an opinion stating the reasons and facts upon which the decision is based." *id.* § 2645(a)(1), (a)(2). In short, as both the Senate and House Reports state, and as DOJ repeatedly conceded in written testimony submitted to Congress, classification cases are to be tried "*de novo*."

The right to a *de novo* trial conclusively resolves the

deference issue that the Solicitor General now raises. For *Chevron* deference is merely a rule of statutory construction that courts are to apply where Congress has indicated its preference to have an agency administer a particular law. Where Congress expressly assigns to the judiciary the right to hear a case *de novo*, there is -- by congressional design -- no role for agency deference. Indeed, this is true even in cases, unlike this one, where Congress indisputably has given the agency rulemaking power in the very area subject to *de novo* judicial review. Thus, even if Customs had been granted authority to issue substantive interpretations of the HTSUS, the express grant of *de novo* judicial review in classification cases would supersede it.

But Customs has not been given any such authority. Its authority to interpret substantive provisions of the tariff schedule is limited to binding customs officials at the ports of entry. This is plain both from the supporting authorities cited in the regulation, and from the regulations' own express purpose merely to achieve uniformity "at the ports of entry" and not to "restrict" the rights of importers seeking a judicial determination of the proper classification. 19 C.F.R. § 10.11. No deference is owed to regulations that the agency itself did not intend to be binding on parties other than agency officials. For this independent reason, Treasury is owed no deference on these regulations.

II

Because the lower courts properly afforded respondent the *de novo* judicial review that Congress provided, the Court need not reach the second question presented. That question, whether the Secretary's rule, 19 C.F.R. § 10.16(c), is reasonable under *Chevron*, arises only if this Court is persuaded that the Secretary's rules merit *Chevron* deference. Nevertheless, were the Court to reach the second question, it could not affirm the regulation as reasonable, for four independent reasons.

First, the Solicitor General's categorical approach conflicts with the plain meaning of the statute. As interpreted by the Solicitor General, the regulations are to be understood to have

"deemed" certain operations, such as permapressing, "not to be incidental to assembly." Pet. Br. 26. Viewing the regulations to establish, *ex ante*, which operations are inherently not incidental "to assembly," *id.*, conflicts with the statutory requirement that a particular operation be compared to "the assembly process" that it accompanied. 19 U.S.C. § 1202, subheading 9802.00.80. Furthermore, the Solicitor General's view that permapressing operations are never incidental to assembly because they involve "chemical treatment" whose "primary purpose" is the "chemical improvement" of an article, 19 C.F.R. § 10.16(c), also conflicts with the statute. The statute presupposes that the operation in question will have "improved in condition" a given article, but nevertheless permits a duty allowance so long as that operation is "incidental to the assembly process." 19 U.S.C. § 1202, subheading 9802.00.80. The regulations thus end the analysis precisely where the statute says it should begin.

Second, the Solicitor General's interpretation of the Customs' regulations here conflicts with Customs' established practice and the Solicitor General's own prior interpretation. In the past, Customs and the Solicitor General consistently have argued that both the examples in the statute of incidental operations (*i.e.*, "cleaning, painting, and lubricating") and the examples in the regulations of incidental operations (*e.g.* "pressing") and of non-incidental operations (*e.g.* "permapressing") are illustrative and do not obviate the need for a case-by-case analysis of whether the particular operation alleged to be incidental is in fact minor when compared to the particular assembly process at issue. Thus, even if the Solicitor General's new interpretation of the law were otherwise permissible, the fact that it conflicts with the "uniform construction which . . . has been given by the treasury department . . . upon similar questions" renders that interpretation unreasonable. *United States* v. *Vowell and M'Clean*, 9 U.S. (5 Cranch) 368, 372 (1810).

Third, the Solicitor General's attempt to apply the "permapressing" regulation to support Customs' decision below

is arbitrary. Permapressing did not take place abroad, because the "chemical treatment" to "impart new characteristics," 19 C.F.R. § 10.16(c)(4), occured in the United States. The curing of the fabric, which did occur abroad, is not equivalent to permapressing, because Customs permitted a duty allowance for the synthetic pants that were cured by pressing. The issue thus is whether using *ovenbaking* in addition to pressing to cure the blended fabric transformed that curing operation into one not incidental to the assembly process. Because ovenbaking merely accomplishes less expensively the same curing that additional pressing would accomplish, and because "pressing" is an operation that the regulations classify as incidental, the regulations, if they apply at all, actually support the judgment below.

Finally, on top of everything else, the agency cannot now receive deference because it has evidently lost the "numerous comments," Pet. Br. 29, that parties filed in response to the notice of proposed rulemaking. Without these comments, respondent cannot address, and this Court cannot determine, whether the agency reasonably responded to the facts and arguments put before it. This extraordinary defect is yet another example, if any were needed, of the unreasonableness of Customs' demand for deference.

ARGUMENT

I. *CHEVRON* DEFERENCE HAS NO ROLE IN THE CONGRESSIONALLY MANDATED TRIAL *DE NOVO* OF CLASSIFICATION DISPUTES

As the government ultimately concedes, the degree of deference that a particular agency determination is due depends on Congress' intent. Pet. Br. 13, 23. But in making the argument on that issue, the Solicitor General's submission to this Court is nothing short of startling. The brief for the United States entirely fails to inform the Court, let alone address, that: (1) the Customs Court Act has a provision, entitled "*Scope and Standard of Review*," which carefully and deliberately provides for a completely *de novo* trial before the CIT in all classifications

disputes (in stark contrast to other actions that *are* expressly made subject to deferential "arbitrary and capricious" review), 28 U.S.C. § 2640; (2) Congress delegated lawmaking power under the HTSUS to the President (USTR), in consultation with the ITC, the expert independent agency created by Congress to study the economic effects of the various tariffs; and (3) in the very regulations here at issue Customs took the formal position that its "interpretive" regulations were issued only to advise the public of the enforcement positions that Customs would take in the future, and to ensure uniformity *among the various customs offices*, and that the regulations did not even "purport[]" to restrict a protestor's right to a judicial determination "of the matters contained therein." 19 C.F.R. § 10.11(a). In the face of this formal position, the Court should give no weight to DOJ's contrary litigating position.

A. Congress Granted Importers The Right To A Trial *De Novo* Of Classification Disputes

Although the brief of the United States virtually ignores the existence of this provision, a proper analysis of the *Chevron* issue should begin with an examination of 28 U.S.C. § 2640, entitled "Scope and Standard of Review." Section 2640 creates a clear and deliberate dichotomy. For many of the disputes that may be brought in the CIT, Congress provided deferential standards of review that traditionally apply to administrative agency review. For example, Congress provided that review of agency determinations in countervailing duty cases shall be governed by the "substantial evidence" test for issues of fact, and the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" test for issues of law and policy, and that the review in such cases would be limited to the record before the agency at the time it made the determination. 28 U.S.C. § 2640(b); 19 U.S.C. § 1516a(b). As the Court is well aware, these are the traditional standards of review that are contained in the Administrative Procedure Act, 5 U.S.C. § 706. Congress likewise specified that courts shall review decisions of

the Customs Service under section 499(b) of the Tariff Act of 1930 "*on the basis of the record before the Customs Service* at the time of issuing such decision or order." 28 U.S.C. § 2640(d) (emphasis added). Similarly, Congress provided that "[i]n any civil action not specified in this section, the Court of International Trade shall review the matter as provided in [the Administrative Procedure Act]." 28 U.S.C. § 2640(e).

While Congress thus directed the CIT to review many Customs determinations under the APA's deferential standards and based on the administrative record, Congress clearly and deliberately provided for a trial *de novo* in a few limited categories of disputes -- including classification cases. Section 2640(a) expressly states in pertinent part:

> The Court of International Trade shall make its determinations *upon the basis of the record made before the court* in the following categories of civil actions:
>
> (1) Civil actions contesting the denial of a protest under section 515 of the Tariff Act of 1930 [19 U.S.C. § 1515].

28 U.S.C. § 2640(a) (emphasis added). Civil actions under section 515 clearly involve a trial *de novo*. To begin with, Congress expressly provided that, unlike review of other actions, the court's decision in a tariff classification dispute would be based on "the record made before the court" -- not the record before the agency. Congress then confirmed beyond all doubt that review was *de novo* when it provided that in "any civil action under section 515 of the Tariff Act of 1930 in which the denial, in whole or in part, of a protest is a precondition to the commencement of a civil action in the [CIT]," the court "may consider *any new ground in support of the civil action* if such new ground (1) applies to the same merchandise . . . and (2) is related to the same administrative decision." *Id.* § 2638 (emphasis added). Again, unlike deferential administrative review, Congress also provided that parties may produce and cross-examine witnesses and introduce documentary and other

evidence under the Federal Rules of Evidence. *Id.* § 2641. Finally, Congress directed the CIT in civil actions to file "a statement of findings of fact and conclusions of law" -- a requirement that is fully consistent with *de novo* review, but is out of place if the court were required to defer to the agency's findings and conclusions. *Id.* § 2645; see *id.* § 2646 (using term "retrial"). In short, the right to raise new issues and develop a new record unmistakably creates a *de novo* proceeding. See *Black's Law Dictionary* 435 (6th ed. 1990) (defining "De Novo Trial" as "[t]rying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered").

In fact, these provisions are far more specific and compelling than others that this Court has previously found sufficient to create a right to *de novo* review. In *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), this Court unanimously held that far less explicit provisions of the Civil Rights Act nevertheless "indicate[d] clearly" that Congress granted federal employees the right to "a trial *de novo*" following the processing of complaints by the Civil Service Commission. *Id.* at 844-45 (citation omitted). The Court relied on: (1) a provision directing the chief judge of a district to "'immediately . . . designate a judge in such district to hear and determine the case'"; (2) a provision for "assign[ing] for hearing"; (3) a direction about "schedul[ing] . . . [the case] for trial"; and (4) a direction that the court order appropriate relief if it "'finds'" that the defendant has committed an unlawful employment practice. *Id.* at 845 (footnote omitted). In contrast, the Customs Court Act of 1980 provides not only for findings of fact and for a trial with witnesses, but also for a civil action that is not based on the record before the agency, and in which parties may rely on any relevant ground, whether or not raised before the agency.

The legislative history unambiguously confirms that classification disputes are to be decided by the court *de novo*. The Senate Report states that "[p]roposed section 2640

specifies the scope and standard of review" in the CIT and that "[p]roposed subsection 2640(a)(1) provides for a trial de novo in suits commenced under proposed section 1581(a)." S. Rep. 96-466 at 18-19 (1979). The House Report likewise repeatedly states that "the bill preserves the right to a trial *de novo* for the review of a denial of a protest." H.R. Rep. 96-1235 at 44 (1980); see *id.* at 22 ("*De novo* review is the general rule for the majority of civil actions commenced in the [CIT].").

Even the Department of Justice has freely conceded the point in written submissions to Congress. At the time Congress was considering passage of the Customs Court Act of 1980, DOJ, the principal drafter and supporter of the bill, informed Congress that "the civil action challenges, *in a trial de novo*, a decision by the Customs Service" and stated that "[w]e strongly believe that this current method of obtaining judicial review ought to be maintained."[2] Remarkably, DOJ also told the Committee that "trial *de novo* is the *most sweeping form* of judicial review available" and that it was not DOJ's intent in drafting the bill "to change that principle at all."[3]

Congress' intent to provide for sweeping *de novo* review of Customs' protest denials also is vividly illustrated by the debate at the time of passage concerning the availability of review of classification rulings in advance of importation, a right that importers did not have under the pre-1980 law. The Department of Justice supported extending the jurisdiction of the court to pre-enforcement challenges to these rulings, but on

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[2] *Hearing on S. 1654 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 96th Cong. 15 (1979) (statement of David M. Cohen, Director, Commercial Litigation Branch, Department of Justice) ("1979 Senate Judiciary Committee Hearing") (emphasis added).

[3] *Hearing on S. 2857 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Comittee on the Judiciary*, 95th Cong. 62 (1978) (statement of David M. Cohen, Chief, Customs Section, Department of Justice) (emphasis added).

two conditions, only one of which was granted. See 28 U.S.C. § 1581(h). Of relevance here, the Department requested that the pre-enforcement review use the deferential "arbitrary and capricious" standard, explaining its position as follows:

> We also believe that the arbitrary and capricious standard is a fair exchange for the opportunity to obtain judicial review prior to the payment of duties. If an importer desires *de novo* review, it should complete the transaction, pay the duties, and institute suit in the Customs Court. If it desires judicial review in advance of the completion of the transaction and payment of the duties, it should be entitled only to review on the record under the arbitrary or capricious standard.

Hearing on H.R. 6394 Before the Subcommittee on Monopolies and Commercial Law of the House of Representatives Committee on the Judiciary, 96th Cong. 60 (1980) (statement of David M. Cohen, Branch Director, Commercial Litigation Branch, Department of Justice). Although early versions of the bill contained this requested limitation, see S. 1654, 96th Cong. § 301 (1979), Congress *deleted* the arbitrary and capricious requirement from the final bill, even for pre-enforcement challenges.[4] Thus, outside of litigation, the Department of Justice's position has been that actions contesting protest denials are subject to "sweeping" *de novo* review.

B. *De Novo* Review Precludes Deference To The Agency's Legal Interpretations

Because the Solicitor General's brief nowhere acknowledges that classification disputes are subject to a *de novo* trial, the

[4] The predecessor to 28 U.S.C. § 2640(e) was in each of the bills before Congress at the time that DOJ lobbied Congress to add the "arbitrary and capricious" limitation to § 1581(h). *See, e.g.*, S. 1654, § 401(a). DOJ thus understood that, without its requested limitation, pre-enforcement challenges to protest denials would be reviewed under the *de novo* standard applicable to classification disputes, rather than under the APA standards provided in § 2640(e).

United States has not attempted in this Court to reconcile its argument with this dispositive fact. In the court of appeals, however, the government conceded that Congress provided for *de novo* review, but argued that this was limited to factual issues. In this Court, its claim for deference to Customs' construction of the tariff schedules rests ultimately on its assertion that the Tariff Act contains an "express delegation" of substantive rulemaking power to the Secretary of Treasury.

Neither of these arguments provides a basis for according *Chevron* deference to the regulations in tariff classification cases. When Congress confers a right to *de novo* judicial review, the law is clear that *de novo* review extends to issues of law as well as of fact. This is true even when the agency has substantive rulemaking authority.

1. Before this Court, the Solicitor General's view is that actions contesting Customs' protest denials are governed by provisions that are "analogous" to traditional deferential review under the Hobbs Act (where review is had directly in the courts of appeals) and the APA. Pet. Br. 16 n.4. In its Reply Brief in the Federal Circuit, however, the United States *conceded* that the statute provides for a *de novo trial* of classification disputes, but argued that this *de novo* standard extended only to questions of fact, not law. U.S. Reply Br. 6.

The Solicitor General's decision to abandon that theory here was well advised. Statutes providing for a *de novo* trial following an administrative determination are hardly unprecedented, and the uniform body of judicial decisions under such statutes rejects deference to the agency's construction of the relevant legal provisions. Indeed, in light of this settled understanding, Congress' expectation when it created a *de novo* action could have been only that the CIT would construe the relevant statutes without according deference to Customs' views.

The leading case establishing the significance of the "*de novo*" standard for review of legal determinations is this Court's

decision in *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), a case that turned on the meaning of the term "privacy" in exemption 7(C) of the Freedom of Information Act. *Id.* at 762-67. In an opinion for the Court, Justice Stevens concluded that because the statute "directs the district courts to 'determine the matter de novo,'" review in FOIA cases was "[u]nlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious." *Id.* at 755. Accordingly, the Court construed the term "privacy" on its own, and concluded that the requirement of *de novo* review meant that the "court must balance the public interest in disclosure against the interest Congress intended the Exemption to protect." *Id.* at 776. The Court thus by no means limited its *de novo* review to issues of fact.

The Court understood the import of a *de novo* review provision in the same way in *United States* v. *First City National Bank*, 386 U.S. 361 (1967), a case under the Bank Merger Act. That Act provides that in any action challenging the decision of the Comptroller of the Currency to approve a bank merger, "the court shall review de novo the issues presented." 12 U.S.C. § 1828(c)(7)(A). Because the Act provided for *de novo* review, the Court rejected the view that the "arbitrary or capricious" standard would govern the interpretation and application of the Act's legal standards, concluding instead that "it is the court's judgment, not the Comptroller's, that finally determines whether the merger is legal." 386 U.S. at 369.

Consistent with these precedents, the courts of appeals have construed provisions establishing *de novo* review to require the court to determine on its own, without deference to the agency, not only issues of fact, but the meaning of the statutory terms as well. Writing for the *en banc* D.C. Circuit, then-Judge Ginsburg described the settled meaning of "*de novo*" review:

> De novo means here, as it ordinarily does, a fresh, independent determination of "the matter" at stake; the court's inquiry is not limited to or constricted by the administrative record, *nor is any deference due the agency's conclusion*. . . . Essentially then, the district court's charge was to put itself in the agency's piace.

Doe v. *United States*, 821 F.2d 694, 697-98 (D.C. Cir. 1987) (en banc) (emphasis added) (citations omitted). Indeed, the *en banc* court further confirmed that "*de novo*" review signals that "the legal issue presented is to be reviewed nondeferentially." *Id.* at 698 n.9. Other members of this Court have expressed a similar view. See *Aronson* v. *IRS*, 973 F.2d 962, 965 (1st Cir. 1992) (Breyer, C.J.) (where a statute provides for *de novo* review the court does not "defer, or give special weight, to the agency's [] answers to the . . . question of statutory interpretation"); *Church of Scientology* v. *IRS*, 792 F.2d 146, 148-51 (D.C. Cir. 1986) (Scalia, J.) (concluding that FOIA's *de novo* review standard applied and construing meaning of tax statute without deference to the IRS); *Church of Scientology* v. *IRS*, 792 F. 2d 153, 156-60 (D.C. Cir. 1986) (en banc) (Scalia, J.) (same).

To be sure, it is the exceptional statute that provides for *de novo* review. In addition to Title VII, FOIA, the Bank Merger Act, and the Privacy Act (which were discussed above), examples where a right to de novo review is provided by statute include the Food Stamp Act and the Banking Control Act. Courts interpreting each of those statutory review schemes have consistently held that "[w]hen a case is properly before the court for a trial de novo, the court must reach its own factual *and legal* conclusions." *Modica* v. *United States*, 518 F.2d 374, 376 (5th Cir. 1975) (emphasis added); *Sims* v. *Dep't of Agric. Food & Nutrition Service*, 860 F.2d 858, 862-3 (8th Cir. 1988) (citing numerous other cases) (Food Stamp Act); *Miller* v. *FDIC*, 906

F.2d 972, 976-77 (4th Cir. 1990) (Banking Control Act).[5]

In its reply brief below, the United States relied for its claim that the court should apply *Chevron* deference, despite the provision for a *de novo* action, on § 706(2)(F) of the APA, which provides that the court should set aside agency action "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." 5 U.S.C. § 706(2)(F). U.S. Reply Br. 6. Section 706(2)(F) of the APA, however, simply makes clear that the reviewing court must make its own determinations of fact when reviewing *de novo*; it does nothing to alter the settled understanding that the court must also reach its own legal conclusions in such actions. Cf. 5 U.S.C. § 706 (court should "decide all relevant questions of law"). Indeed, the precise argument advanced by the United States below was soundly rejected by the District of Columbia Circuit, sitting en banc. See *Church of Scientology* v. *IRS*, 792 F.2d at 156-63. In his separate concurrence in that case, Judge Silberman, relying in part on § 706(2)(F), argued that the court should apply *Chevron* deference to an agency's construction of a statute, even where the act provides for a *de novo* trial, *id.* at 168-172. However, not a single other judge on that *en banc* court agreed with Judge Silberman's view, see *id.* at 160-63 (Scalia, J.) (construing statute *de novo* and rejecting agency's interpretation), and Judge Silberman himself has apparently abandoned his prior view. See *Kelley* v. *EPA*, 15 F.3d 1100, 1105 (D.C. Cir. 1994) (Silberman, J.) (because Congress "provided for *de novo* judicial review of [EPA's] 'particularized

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[5] Indeed, deference to Customs' legal interpretations under the Tariff Act would be particularly inappropriate, because the Customs Court Act of 1980 created an extreme form of *de novo* review. The 1980 Act constitutes one of the "few rare contexts" where "Congress so mistrusts the agency that it provides for an independent judicial fact finding as well as an independent judicial determination." 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 10.2 at 22 (2d ed. 1997). Congress' expression of mistrust of Customs, which echoes Justice Story's assessment from 150 years earlier, strongly counsels against deference to the agency's legal interpretations.

decision respecting liability,'" EPA regulation not entitled to *Chevron* deference despite EPA's formal rulemaking power).

In addition, the DOJ (which was primarily responsible for drafting the 1980 Act) has stated to Congress that Customs' construction of the tariff schedules (and not only its factual conclusions) would be effectively reviewed *de novo* in a subsequent court action – a view on which Congress relied when it enacted the 1980 Act. In a written submission to Congress during consideration of the 1980 Act, the Department (with the concurrence of the Deputy Chief Counsel of the Customs Service) explained:

> Over the years, the Customs Service has developed a procedure which it utilizes to provide advice to members of the public who wish to engage in an import transaction as to the manner in which the Service will treat an importation of merchandise, *for example, the manner in which the merchandise would be classified or valued under the Tariff Schedules of the United States.*
>
> Under current law, judicial review of a ruling issued pursuant to the procedure established by the Customs Service can effectively be obtained only after an importation has occurred, the merchandise is treated in accordance with the ruling, a protest is filed and denied, the duties assessed are paid, and a civil action contesting the denial of the ruling is instituted in the Customs Court. *The ruling is in effect reviewed in the course of the judicial proceeding in that the civil action challenges, in a trial de novo, a decision by the Customs Service made in accordance with the ruling.*
>
> We strongly believe that this current method of obtaining judicial review ought to be maintained.

1979 Senate Judiciary Committee Hearing 15 (emphasis added). Thus, the DOJ not only understood that its legal rulings on issues of classification under the Tariff Schedules are "in effect" reviewed *de novo* in the subsequent civil action, it urged

Congress to retain that scheme. By providing for a *de novo* trial of classification disputes, Congress preserved the *de novo* standard for legal issues that DOJ endorsed.

2. *De novo* review extends to questions of law even where, unlike here (see Part I.C, *infra*), Congress delegates substantive rulemaking power to an agency. For such delegation creates only a "*presumption*" that Congress intended the courts to defer to the agency's construction of the relevant statute. *Smiley* v. *Citibank (South Dakota)*, 517 U.S. 735, 740-41 (1996) (emphasis added). The Solicitor General's analysis not only begins, but ends with the articulation of this presumption. Pet. Br. 13, 23. Like all presumptions, however, this presumption can be overcome by indications in the "statutory scheme" that Congress did not intend deference to the agency's views. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 515-16 (1989).

Here, Congress has made plain, by providing for *de novo* judicial review, that it intends no deference to the agency's views on tariff classification. Although the United States asserts that such a reading would make the Tariff Act "the only instance of which we are aware in which Congress has stripped an agency of the deference to which its interpretations are traditionally entitled," Pet. Br. 22, this case is far from unique. When, as here, Congress has provided that a party's liability under a statute would be determined in an independent judicial trial, courts consistently have refused to accord *Chevron* deference even to "full dress" regulations, Pet. Br. 29, promulgated pursuant to a grant of substantive rulemaking power.

A leading case illustrating this principle is *Adams Fruit Company* v. *Barrett*, 494 U.S. 638 (1990). Although Congress delegated substantive rulemaking authority to the Department of Labor under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1861, and DOL exercised that authority by promulgating a regulation that construed the pre-

emptive scope of that Act, this Court declined to accord *Chevron* deference to that regulation. The Court reasoned that, by providing for a trial on liability in the federal district courts, "Congress ha[d] expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute." 494 U.S. at 649.

The proof that Congress did not intend the courts to defer to the agency's statutory construction even where the construction is embodied in regulations and even where the agency otherwise possesses substantive rulemaking power is overwhelming where Congress provides for *de novo* review. A perfect illustration of this is the Food Stamp Act. That Act expressly provides the Secretary of Agriculture with broad authority to "issue such regulations . . . as the Secretary deems necessary or appropriate for the effective and efficient administration of the food stamp program." 7 U.S.C. § 2013. Consistent with that authority, the Food and Nutrition Service has issued detailed guidelines specifying the circumstances in which stores will be disqualified from participating in the food stamp program for misuse of the stamps. Nevertheless, because that Act expressly provides for *de novo* review of the FNS' disqualification determinations, the uniform consensus of the courts of appeals is that those guidelines "are not binding on the court in making its de novo review." *Sims*, 860 F.2d at 863. Moreover, the outcome of those cases would not be different if the agency had issued regulations instead of guidelines, for the holdings turn not on the process that attended the promulgation of the agency's views, but on Congress's decision to provide for *de novo* judicial review. See *id.* Indeed, recognizing its limited role in a scheme providing for *de novo* review, the Agriculture Department itself now "strenuously object[s]" to characterizing its guidelines as binding regulations. *Id.* at 861.

Thus, because Congress provided for a *de novo* trial of classification disputes following the denial of a protest by Customs, it would be inappropriate, and contrary to Congress'

intent, to confer *Chevron* deference on Customs' constructions of the Tariff Schedules.[6]

C. The Secretary's Limited Rulemaking Power Is An Independent Reason To Reject *Chevron* Deference

Even aside from the Act's provision for *de novo* review, the factual premise that underlies Customs' claim for deference is unfounded. Congress did not bestow upon the Customs Service substantive rulemaking power under the tariff schedules. This is abundantly clear because (1) the sources of authority Customs cited for its regulation do not give Customs such power; (2) if any agencies have such power, they are the USTR or ITC; and (3) most tellingly, Customs itself did not purport to exercise such power when it promulgated its regulations.

1. Congress delegated to the Secretary of Treasury the authority to issue only two types of regulations with respect to tariff classification: (1) rules that bind the thousands of customs officers in the hundreds of ports of entry nationwide, and that thus ensure a uniform enforcement policy; and (2) procedural regulations that determine the forms and other procedures that importers must follow in bringing goods into the country and preserving their claims. Congress simply did not vest in the Secretary the authority to issue substantive rules construing the meaning of the Tariff Schedules that would qualify for deference under *Chevron*.

When Customs promulgated the regulations at issue, it invoked as authority five different statutory provisions. Understandably, the United States' brief does not rely on (or

[6] The United States' reliance on *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978), Pet. Br. 21, which predates the 1980 Act, is unavailing. *Zenith* involved countervailing duties, which have sensitive foreign policy implications, not classification. Unlike for classification, the standard of review for countervailing duty cases was confused prior to 1979, when Congress first clarified that deferential APA review for countervailing duty cases was appropriate. *See* page 6, *supra*; *see also* 28 U.S.C. § 2640(b).

even mention) three of those provisions -- 5 U.S.C. § 301, 19 U.S.C. § 66, and 19 U.S.C. § 1624. Those provisions are nevertheless worth examining, because they illustrate how limited the Secretary's rulemaking power is in this area and help explain why Customs itself was careful to disclaim any attempt to exercise substantive rulemaking power when it issued these regulations.

The first section, 5 U.S.C. § 301, which applies to all executive departments, authorizes the "head of an Executive department" merely to "prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use and preservation of its records." *Id.* This provision authorizes the Secretary to issue rules to govern the actions of the customs service, but not to promulgate rules that bind the public.

The rulemaking power conferred by 19 U.S.C. § 66 (entitled "Rules and forms prescribed by Secretary") is likewise limited:

> The Secretary of the Treasury shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations not inconsistent with law, to be used in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to warehousing, and shall give such directions to customs officers and prescribe such rules and forms *to be observed by them* as may be necessary for the proper execution of the law.

Id. (emphasis added). Here again, Congress authorized the Secretary only to issue procedural rules for the public and "directions to customs officers," not substantive regulations that bind the public.[7]

[7] The Solicitor General's decision not to rely on a third statutory provision cited in the regulations -- 19 U.S.C. § 1624 -- is likewise well advised. Like the other provisions, § 1624 has long been construed to authorize the Secretary

(continued...)

The two statutory bases that the United States does offer in support of the Secretary's purportedly broad authority to issue substantive rules are in fact equally limited. First, the Solicitor General relies only on selected language from section 1502(a) (Pet. Br. 14) and omits the language that makes clear that the provision authorizes the Secretary simply to direct the uniform enforcement of the import laws by customs officers at the various ports of entry, not to issue rules that bind the public. In relevant part, section 1502(a) (entitled "Regulations for *appraisement* and *classification*") states:

> The Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with law . . . to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon *at the various ports of entry*. The Secretary may direct any customs officer to go from one port of entry to another for the purpose of appraising or classifying or assisting in appraising or classifying merchandise imported at any port, and may direct any customs officer at any port to review entries of merchandise filed at any other port.

19 U.S.C. § 1502(a) (emphasis added). That section 1502 simply authorizes the Secretary to ensure uniformity among "the various ports of entry" by issuing directions to the customs officers is made unmistakably clear by section 1502(b):

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[7] (...continued)
to issue only "regulations which are addressed to the Collector of Customs for guidance in the conduct of the business of his office," but which need not be "compli[ed]" with as a "condition precedent to recovery." *See, e.g., United States* v. *Browne Vintners Co., Inc.*, 34 C.C.P.A. 112, 116 (1946). Moreover, as this Court has held, § 1624 is a general provision that "merely implement[s] authority which is granted the Secretary" elsewhere in the Act. *Barr* v. *United States*, 324 U.S. 83, 93 (1945). Section 1624 thus cannot be read to override the limitations on the Secretary's rulemaking authority contained in those provisions that specifically address classification, let alone to trump the force of the *de novo* review provision.

> It shall be the duty of all officers of the customs to execute and carry into effect any instructions of the Secretary of the Treasury relative to the execution of the revenue laws; and in case any difficulty arises as to the true construction or meaning of any part of the revenue laws, the decision of the Secretary shall be binding *upon all officers of the customs.*

Id. § 1502(b) (emphasis added). Had Congress truly thought that § 1502(a) conferred upon the Secretary the authority to issue legislative rules that had the force and effect of law and that bind the courts and the public, it would have had no need to clarify that those regulations would also bind the "officers of the customs." Clearly, section 1502, like other "grants" on which the United States no longer relies, authorizes the Secretary to issue binding instructions to customs officers, but does not provide any basis for the Secretary to assume a substantive lawmaking power under the Tariff Schedules.

Finally, the United States relies on Headnote11 of the Tariff Schedules. By its express terms, however, that headnote authorizes the Secretary to issue regulations governing the "*admission*" of articles into the United States. "Admission" is a term used by Congress to refer to the physical movement of goods into the United States. *Cf.* 19 U.S.C. § 81c; 15 U.S.C. § 1124. The headnote simply recognizes the authority of the Secretary to issue procedural rules governing the manner in which goods may be admitted into the ports; it does not authorize the promulgation of any substantive rules governing the "classification" of articles. Indeed, the term "classification" appears only in the second sentence of the headnote, and it reveals how limited the Secretary's "rulemaking" role is under the tariff schedules. That sentence provides that the "allowance of an importer's claim for classification . . . *on the basis of facts which are not determinable from an examination of the article itself in the condition as imported*, is dependent upon his complying with any rules and regulations which may be issued

pursuant to this headnote." Headnote 11. By its terms, therefore, a claim for classification is dependent on compliance with the regulations issued under the headnote *only* where it is impossible for the customs officers to determine the correct classification on the basis of a physical examination of the article. The regulations to which this headnote refers are thus plainly procedural rules -- those that would assist a customs officer in an "examination of the article" -- and not substantive interpretations of the tariff schedule.

The legislative history of Headnote 11 overwhelmingly confirms that it was not intended to give Customs substantive rulemaking authority. Headnote 11, like the TSUS itself, was drafted for Congress' consideration by the United States Tariff Commission. As the United States conceded below (U.S. Fed. Cir. R. Br. 13), the legislative history of the headnote consists therefore in the "Submitting Report" prepared by the USTC. That report set forth the USTC's understanding of the relevant roles of the various organs of government "in connection with adoption of [the] proposed schedules":

> The Congress will need to enact implementing legislation . . .; the President will need to terminate or appropriately modify a number of outstanding proclamations related to the existing tariff laws; the Tariff Commission will need to bring the revision up to date to reflect customs rulings, legislation, or other actions taking place after submission of the proposed revision; *the Bureau of Customs will need to issue instructions to customs officers*; and the Bureau of Census will need to make provision for the statistical matters involved.

United States Tariff Commission, *Tariff Classification Study*, Submitting Report 28 (1960) (emphasis added).[8] The USTC

[8] The expression "customs rulings" is a reference to the obligation of the ITC

(continued...)

further underscored its expectation that Customs would be performing a purely enforcement role in implementing the tariff schedules: "[n]either the Bureau nor any of its field officers *has any discretion in determining a tariff classification of imported articles*. They are functioning strictly in an administrative capacity and must *enforce* the tariff laws *as enacted by the Congress* or as modified pursuant to duly constituted authority." *Id.* at 44 (emphasis added). The fact that the drafters of Headnote 11 viewed Customs strictly as an enforcement agency with no discretion in enforcing the schedules as enacted by Congress, and their intention to have the headnotes eliminate the need to exercise discretion,[9] confirms that Headnote 11 cannot reasonably be read as conferring substantive rulemaking authority on Customs to construe the schedules in a manner that would be binding on the courts and the public.

In light of Customs' limited role as an enforcement agency for tariff classifications, and of the limited role of the Secretary in issuing instructions to the customs officers, it would be highly unusual to accord Customs' interpretations any deference. As Justice Scalia observed in a related context, "[i]t is entirely reasonable and understandable that federal officials should make available to their employees legal advice regarding [a statute's] interpretation . . . but that is not the sort of specific responsibility for administering the law that triggers *Chevron*." *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring).

2. Indeed, the Solicitor General can make the claim that Congress delegated lawmaking power under the schedules to the Customs Service only by failing even to acknowledge the existence, much less account for the role, of two additional

(...continued)

to modify the schedules in light of *judicial* decisions in protest denial actions. *See* P.L. 87-456 § 202(c).

[9] See Opp. to Pet. for Cert. 27; Br. for Customs Bar Association as Amicus Curiae, 17-20.

bodies: The United States International Trade Commission ("ITC") (formerly the United States Tariff Commission), and the office of the United States Trade Representative ("USTR"). An examination of their roles shows that if Congress vested lawmaking power in any agency in connection with the tariff schedules, that agency is the USTR.

When Congress enacted the HTSUS in 1988, it understood that the schedule would need constant refining in light of changed conditions, administrative needs, and new treaties. It therefore directed the ITC to "keep the harmonized Tariff Schedule under continuous review" and to "recommend to the President such modifications in the [schedule] as the Commission considers necessary and appropriate" to "conform" to amendments to the Convention, "to ensure that [the schedules] are kept up to date in light of changes in technology or in patterns of international trade," and "to alleviate unnecessary administrative burdens." 19 U.S.C. § 3005(a). "In formulating recommendations" for modification to the schedules, the ITC is required to give all "interested parties" notice and an opportunity to comment. *Id.* § 3005(b), (b)(1).

On the basis of the "recommendations" of the ITC, the President is empowered by Congress to "proclaim modifications" to the schedules so long as those obligations are "in conformity" with U.S. obligations under the convention, and "do not run counter to the national economic interest of the United States." 19 U.S.C. § 3006(a), (a)(1), (a)(2). "Modifications" proclaimed by the President take effect after a 60-day layover period before Congress, and are published in the Federal Register. *Id.* § 3006(b), (c). Functionally, these "modifications" operate like legislative rules promulgated by the President. Consistent with Congress' instruction that "the United States Trade Representative is responsible for coordination of United States Trade policy in relation to the Convention," *Id.* § 3009, the President formally delegated his authority to place recommended modifications before the

Congress for review to the USTR – not to Customs.

In stark contrast to the role of the ITC as the expert independent agency entrusted with the constant study of economic, legal, administrative and technological changes that affect the schedules, and in opposition to the role of the USTR as the lead policy maker in formulating the nation's trade policy, the Customs Service's role under the schedules is simply that of a law enforcement body. Customs officers are authorized to carry weapons, execute search and arrest warrants, and "perform any other law enforcement duty" assigned to them by the Secretary. 19 U.S.C. § 1589a. The Commissioner of Customs is in turn authorized to "direct the advance of funds . . . in connection with the enforcement of the customs laws," *id.* § 2077, and is directed to submit annual studies on the "number and extent of violations of the trade, customs and illegal drug control laws," *id.* § 2083(a)(1), and to "develop a nationally uniform enforcement strategy for dealing" with such violations. Compare 19 U.S.C. §§ 3005(a), 3006(b), with 19 U.S.C. § 2083(c)(1).

In short, although Congress vested in the President (and thus indirectly in the USTR) the responsibility for crafting national trade policy, and delegated to the President (USTR) a lawmaking function under the schedules, with respect to tariff classification Congress expected Customs to perform strictly as a law enforcement agency.

3. Finally, it is Customs itself that has best expressed the limited nature of its grant of authority. In what is perhaps the most remarkable aspect of this entire dispute, the very regulations at issue here demonstrate that the Customs Service clearly understood when it issued these rules that they were simply enforcement guidelines that would not be binding on the courts. Specifically, in response to comments on the proposed rules, see 40 Fed. Reg. 43021, Customs added the following language to its final rule to distinguish its interpretive rules (described below) from its procedural rules:

> The definitions and regulations that follow are promulgated to inform the public of the constructions and interpretations that *the United States Customs Service shall give* to relevant statutory terms and to assure the impartial and uniform assessment of duties upon merchandise claimed to be partially exempt from duty . . . *at the various ports of entry*. *Nothing* in these regulations purports or *is intended to restrict* the legal right of importers or others *to a judicial review of the matters contained therein.*

19 C.F.R. § 10.11(a) (emphasis added); compare *id.* § 10.11(b) (describing procedural rules).[10] The United States' claim for deference to Customs' interpretation of the schedules is thus ironic, for if deference is owed to anything Customs has issued in this case it would be to this understanding of the limited nature of its own regulations. See *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965) (very great deference is paid to an agency's interpretation of its own regulations).

D. The United States' Policy Arguments For Deference Are Groundless

Finally, the United States presents a number of policy arguments to support its claim that the Court should accord

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[10] In his formal delegation of authority to Customs, which the Solicitor General quotes out of context, Pet. Br. 13 n.3, the Secretary similarly described Customs' authority as limited to binding customs officials and informing the public of Customs' procedures, and made no mention of substantive rulemaking power:

> Regulations shall be prescribed by the Commissioner of Customs, with the approval of the Secretary of the Treasury, except that regulations and instructions . . . which are effective only against persons in their capacity as officers, agents, or employees of the Customs Service, and which do not prescribe procedures which the public should know or follow in dealing with the Customs Service, may be prescribed by the Commissioner of Customs without the approval of the Secretary of the Treasury.

Treasury Dep't Order No. 165, T.D. 53160 (Dec. 15, 1952).

Chevron deference to Customs' constructions of the tariff schedules. Those claims should instead be presented to Congress, and, in any event, provide no support whatsoever for deference.

First, the United States claims that the Federal Circuit's holding would leave "the Customs Service without effective guidance." Pet. Br. 21. This claim is frivolous. Customs, like other enforcement agencies, has ample authority to issue guidelines that bind its officers in their day-to-day application of the schedules. That authority is in no way diminished simply because those regulations will not be binding on the courts in subsequent *de novo* trials.

Second, citing the House Report to the 1980 Act, the United States suggests that withholding deference to Customs' regulations would undermine Congress' goal of uniformity. Again, however, the Solicitor General quotes out of context. See Pet. Br. 22. Noting that "uniformity is threatened today because the federal district courts" share "jurisdiction" with the Customs Court, the House Report stated that the constitutional mandate of uniform duties will be achieved under the Act "'*by utilizing the national jurisdiction of the Customs Court* to provide uniform and consistent interpretation and application of the laws involved in disputes arising out of import transactions.'" H.R. Rep. No. 96-1235, at 29 (emphasis added). Congress thus ensured uniformity by creating a single national court to entertain civil actions -- not by relying on Customs to issue binding regulations.

Third, the United States complains that the *Mast* factors test produces an *ad hoc* approach. Even if so, the solution does not lie in deferring to the interpretations of the enforcement agency. If enforcement of a particular term in the Tariff Schedules creates "unnecessary administrative burdens," 19 U.S.C. § 3005(a)(4), the President, on the recommendation of the ITC, is authorized to modify that term. Alternatively, in a future case the United States could ask this Court to reverse the Federal

Circuit's multi-factor test and replace it with a more absolute inquiry. Disagreement with *Mast* provides no basis, however, for permitting Customs to take on a lawmaking role that cannot be squared with either the limited authority that Congress bestowed on it, or with Congress' decision to provide for a *de novo* trial of classification disputes.

II. THE REGULATIONS MERIT NO DEFERENCE UNDER *CHEVRON*

The United States does not challenge the lower courts' determination under *Mast* that the curing operation at issue in this case was incidental to assembly. Rather, the Solicitor General seeks only to establish that his construction of 19 C.F.R. § 10.16(c) -- that permapressing, categorically, is an operation not incidental to assembly -- represents a reasonable interpretation of the HTSUS that is entitled to deference under *Chevron*. Accordingly, if this Court agrees that the CIT properly undertook a *de novo* review of Customs' decision to deny Haggar a duty allowance, the Court should affirm without reaching the reasonableness of Section 10.16(c).

If, however, this Court concludes that the *Chevron* framework is applicable to this case, then, as the Solicitor General suggested in seeking certiorari, a prudent course for this Court to follow would be to remand to the CIT for its determination because the administrative record is incomplete and because an assessment of reasonableness requires consideration of numerous factors and arguments not addressed below and better suited to a specialized court. Should the Court decide to resolve this issue now, however, then the United States' categorical interpretation of the statute should be granted no deference. The Government's interpretation is contrary to the plain language of the statute and to consistent agency practice, and its proposed application in this case is arbitrary.

A. The Solicitor General's Interpretation Is Contrary To The Language Of The Statute

The first step in any inquiry under *Chevron* is "whether

Congress has directly spoken to the precise question at issue," for if it has, the Court "must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 842-43 & n.9. The second step, whether the administrative construction "is based on a permissible construction of the statute," arises only "if the statute is silent or ambiguous with respect to the specific question." *Id.* at 843 (footnote omitted). Here, the agency's regulations as interpreted by the Solicitor General cannot survive step one, because they conflict with the express command of the statute.

Section 10.16(c), according to the Solicitor General, first sets forth "a general regulatory definition of the statutory concept of operations 'incidental' to assembly," Pet. Br. 28, which identifies two types of non-incidental operations, those whose "primary purpose is the fabrication, completion, physical or chemical improvement of a component," and those that "are not related to the assembly process." 19 C.F.R. § 10.16(c). The regulation then "list[s] several specific operations that are deemed *not* to be incidental to assembly under the regulation," Pet. Br. 26, and identifies "[c]hemical treatment of components or assembled articles to impart new characteristics, such as . . . permapressing" as one such operation. § 10.16(c)(4). This regulation conflicts with the statute for two reasons.

First, the Solicitor General interprets the statute as permitting Customs to identifiy, in advance, certain operations that intrinsically are "not incidental to assembly," no matter what the facts surrounding a particular assembly process or incidental operation may be. Pet. Br. 26. That is not the inquiry that the statute commands. The statute asks not that an operation be compared to "assembly" in the abstract, but that it be compared to "the assembly process." 19 U.S.C. § 1202, subheading 9802.00.80. Because each article has its own assembly process, this language can meaningfully be read only to refer to the specific assembly process used to create the article whose duty is in question. That the statute requires a comparative inquiry

into the significance of a given operation in light of a particular assembly process, and not a classification *ex ante*, is further evidenced by the plain meaning of the term "incidental," which compels a comparative inquiry. See U. S. Opp. to Pet. for Cert., *Chrysler Corp.* v. *United States*, No. 95-2508 (1995) ("*Chrysler* Opp.") (ordinary meaning of "incidental" is "'subordinate, nonessential . . . occurring as a minor concomitant" or "being likely to ensue as a chance or minor consequence'") (quoting *Webster's Third New International Dictionary* (1986)); *Black's Law Dictionary* 762 (6th ed. 1990) (defining "incidental" as "[d]epending upon or appertaining to something else as primary").

Such a comparative inquiry into particular facts is precisely the approach developed by the United States Customs Court in *Mast* and endorsed by the Customs Service and the Solicitor General in the past. See Part II.B, *infra*. It is needed, as the United States explained in its opposition brief in the *Chrysler* case, to avoid the "absurd consequences" that would flow from treating the statute and regulations as ones that "'define'" particular operations as necessarily incidental or non-incidental. *Chrysler* Opp. at 5-6. Of course, just as the magnitude of "complex painting processes" could far outstrip a modest assembly process, see *id.*, so could a chemical treatment that imparted new characteristics to a garment be so modest as compared to assembly that it would be incidental. See Priv. Ltr. Rul. HQ 557195 (Oct. 14, 1993) (chemically treating garments with a fabric softener to impart "a softer, smoother feel" is incidental to assembly). Deeming particular operations to be inherently non-incidental to "assembly" in the abstract conflicts with the comparative inquiry mandated by the statute into "the assembly process" and its ancillary operations, and is therefore unreasonable.

Second, the agency erred not only in classifying certain operations, *ex ante*, as intrinsically incidental or non-incidental to "assembly," but also in using criteria for classifying

permapressing operations that conflict with the statute. Thus, Section 10.16(c) classifies as non-incidental those operations whose "primary purpose is the . . . chemical improvement" of a component. 19 C.F.R. § 10.16(c). The "primary purpose" criterion sweeps far too broadly, however, because -- by definition -- *any* operation that is not intended to assemble an article (and hence is not part of the assembly process) will have as its "primary purpose" some object other than assembly. Yet the statute plainly reveals that Congress intended to allow a duty allowance so long as the operation, though not part of the assembly process, was incidental to it.

Similarly, the classification is impermissible because it excludes from consideration operations whose primary purpose is the "chemical improvement" of a component of the article. Subheading 9802.00.80 of the HTSUS, however, permits a duty allowance for American-made products assembled abroad that "have not been advanced in value or *improved in condition* abroad *except* by being assembled and *except* by operations incidental to the assembly process such as cleaning, lubricating, and painting." 19 U.S.C. § 1202, item 807.00 (emphasis added). These words plainly indicate that operations that advance the value of a product or improve its condition do *not* preclude an allowance so long as those operations are incidental to the assembly process. As the court of appeals has recognized, "item 807.00 [the predecessor of Subheading 9802.00.80] logically assumes that there *has been* an advancement or improvement, but limits the extent of the advancement in value or improvement in condition to that which is brought about solely *by the act of assembly or operations incidental thereto*." *Miles* v. *United States*, 567 F.2d 979, 983 (C.C.P.A. 1978); *Mast Indus.*, 668 F.2d at 505-06.

The legislative history of item 807.00 confirms the plain meaning. The United States Tariff Commission drafted item 807.00 to overturn judicial precedent that had permitted a duty allowance for goods assembled abroad only "so long as the

American article itself has not been advanced in value or improved in condition." *C.J. Tower & Sons*, 33 Cust. Ct. at 14, 23; see U.S. Tariff Commission, *Tariff Classification Study*, Submitting Report, Schedule 8, at 13, 15 (1960); Tariff Schedules Technical Amendments Act of 1965, Pub. L. No. 89-241, § 85, 79 Stat. 933, 949 (1965). The point of item 807.00, then, was to ensure that articles could be improved in condition (or advanced in value) and still receive a duty allowance, so long as these improvements resulted from the assembly process and operations incidental thereto.

The examples in subsection 10.16(c)(4) of operations whose primary purpose is the "chemical improvement" of an article are thus impermissible. That subsection deems "[c]hemical treatment of components or assembled articles to impart new characteristics, such as . . . permapressing" to be non-incidental. 19 C.F.R. § 10.16(c)(4). To impart new characteristics through chemical treatment is simply one way to improve the condition or advance the value of an article. Thus, to identify an operation, such as permapressing, that imparts new characteristics barely begins the statutory inquiry; it does not say anything about whether that operation was "incidental to the assembly process." See Pet. App. 3a, 22a-23a.

What the agency meant by the other general criterion for classifying non-incidental processes, those which are "not related to the assembly process," 19 C.F.R. § 10.16(c), is not clear. But that criterion plainly provides no additional support for the permapressing regulation. The only factor mentioned in the regulations that would distinguish "permapressing" -- which the Solicitor General now claims is unrelated to assembly -- from "pressing," which *is* related to assembly under the regulations, see *id.* § 10.16(b)(7), is that permapressing involves a "chemical treatment" that is intended "to impart new characteristics," *id.* § 10.16(c)(4), and thus has as its "primary purpose" the "chemical improvement" of the article. *Id.* § 10.16(c). Thus, at least for "permapressing," the second general

criterion collapses into the first, plainly invalid criterion.

B. The Solicitor General's Interpretation Of The Regulations Conflicts With Agency Practice

Even if Subheading 9802.00.80 could permissibly be read to permit Customs to "deem," *ex ante*, that certain operations inherently are, or are not, incidental to assembly, in practice that is not how Customs has read either the statute or its regulations. For this reason as well, the Solicitor General's interpretation merits no deference.

In Subheading 9802.00.80, Congress gave three examples of "operations incidental to the assembly process": cleaning, lubricating, and painting. As noted above, Customs' regulations provide a number of additional examples both of operations considered incidental to assembly and of those not considered incidental to assembly. 19 C.F.R. § 10.16(b)-(c). In case after case involving these operations, Customs has treated the examples listed in the statute and regulations not as binding classifications, but merely as examples.

In *General Motors Corp.* v. *United States*, 976 F.2d 716 (Fed. Cir. 1992), for instance, Customs successfully defended its determination that American-made automobile components that had undergone "finish painting" in Mexico were ineligible for a duty allowance. *Id.* at 717-19. In response to GM's argument that the statute expressly lists "painting" as an operation incidental to assembly, Customs argued against a categorical interpretation, reasoning that the type of painting involved in the case was "'not of such a minor nature as to be considered incidental to the main assembly process.'" *Id.* at 718.

Customs advanced the same interpretation of the statute in *Chrysler Corporation v. United States*, 86 F.3d 1173 (Fed. Cir.), *cert. denied*, 117 S. Ct. 82 (1996), which involved the same provisions at issue in *General Motors*. In opposing Chrysler's petition for certiorari, the Solicitor General argued that a categorical interpretation of the statute's listed examples

would conflict with its central purpose:

> There was no intent to have the listed examples become the tail that wagged the proverbial dog -- and to enable manufacturers to secure duty exemptions by "assembl[ing]" goods only as a minor or incidental aspect of complex painting processes that add vastly more value to the goods than the assembly itself.

Chrysler Opp. 5-6. The Solicitor General also maintained that the regulatory reference to "painting" could not be considered categorically as a safe harbor, and that the particular painting operation at issue needed to be evaluated on its facts: "The regulation on which petitioner relies, 19 C.F.R. § 10.16(b)(3), makes clear that the 'application of . . . paint' is offered merely as an 'example[] of operations which are incidental to the assembly process,' and does not support petitioner's contention that *all* painting therefore qualifies as incidental." *Id.* at 9-10 (omission and alteration in original).

Customs consistently has taken this same position in other cases requiring construction of these regulations. In *Surgikos* v. *United States*, 12 C.I.T. 242 (1988), Customs sought to treat a folding operation ("finish folding") as a non-incidental operation, even though subsection 10.16(b)(7) classifies "folding" as an operation "incidental to the assembly process." Based on a *Mast* analysis of the folding operation, the CIT found in favor of Customs, concluding that the time and cost involved in the operation were too considerable for it to be considered incidental to assembly. *Id.* at 245. Similarly, Customs has rejected a categorical interpretation of "cleaning," which both the statute, Subheading 9802.00.80, and its regulations, 19 C.F.R. § 10.16(b)(1), list as an example of an operation incidental to assembly. In a 1994 letter ruling, Customs announced that it would not "consider sterilization to be comparable to a cleaning process and incidental to assembly, without an analysis of the relevant factors in each case as set forth by the court in *Mast*." Priv. Ltr. Rul. HQ 557018 (Mar.

28, 1994). Thus, when a categorical reading would result in a diminution of the duties owed, Customs has not hesitated to adopt a flexible construction of its regulations.

Most notably, Customs has used a fact-sensitive analysis to permit an allowance even for permanent-pressed slacks. In a 1987 letter ruling, Customs advised a manufacturer that its slacks remained eligible for a duty allowance even though they had been treated with a chemical pressing agent after their assembly in Jamaica. Priv. Ltr. Rul. HQ 554399 (Jan. 15, 1987). Thus, even though the "[c]hemical treatment of components . . . to impart new characteristics," 19 C.F.R. § 10.16(c)(4), occurred abroad, Customs determined that the operation was "simpler than ordinary permanent pressing," and of "relatively minor cost," and on that basis concluded that it was "incidental to the assembly as part of the pressing operation." Priv. Ltr. Rul. HQ 554399. Once again, Customs did not treat its regulation as establishing conclusive presumptions that certain operations are non-incidental.

Indeed, the record in the instant case is fully consistent with this case-by-case approach. Customs did not rely on its regulation until it received the CIT's invitation, *after* post-trial briefing was otherwise complete, to address the issue. J.A. 9, Dkt. Nos. 54, 55. Rather, Customs analyzed whether one particular step in the permapressing process -- curing -- could be considered incidental to assembly.

The Solicitor General's new interpretation of the regulations thus conflicts with the agency's practice and with the Solicitor General's own defense of that practice in *Chrysler*. Moreover, nowhere in the administrative record did the agency explain or defend the view that certain processes are inherently not incidental (or are incidental) to assembly.[11] Accordingly, the

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[11] According to the Solicitor General (Pet. Br. at 26 n.11), the agency determined that permapressing is not an operation incidental to assembly in Headquarters Ruling 027763 (Sept. 13, 1973). But this cursory two-page

(continued...)

view propounded in the United States' brief should be deemed a litigating position not entitled to deference. *Bowen* v. *Georgetown University Hosp.*, 488 U.S. 204, 212 (1988) ("declin[ing] to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question"); *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992).

In fact, this Court refused to countenance such opportunism in a case that, ironically, the Solicitor General now misreads and mistakenly relies upon in the final passage of the United States' opening brief. See Pet. Br. at 31 (quoting *United States* v. *Vowell & M'Clean*, 9 U.S. (5 Cranch) 368, 372 (1810)). In *Vowell & M'Clean*, this Court held that, after Customs consistently had adopted a narrow definition of the word "imported" in instances when a narrow definition yielded higher duties, it could not change course and apply a broad definition of the term in order to avoid a diminution of duty. 9 U.S. (5 Cranch) at 372. In his opinion for a unanimous Court, Chief Justice Marshall concluded that Customs' new broad definition was incorrect, but noted that even "if the question had been doubtful," the Court would defer to the agency's longstanding construction of the term rather than to the agency's new litigation position. *Id.*

Here, once again, Customs has obtained higher duties by looking to the *Mast* factors to determine, case by case, whether particular "folding," "painting," and "cleaning" operations qualify as incidental under its regulations. It cannot now refuse to examine those factors in order to avoid the possibility that duties may be reduced. Accordingly, this Court should

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[11] (...continued)
letter states only that an oven-curing operation is not incidental to assembly because it "imparts a new set of characteristics" to the garments -- precisely the analysis that the plain language of the statute precludes. Like the regulations, this letter does not define permapressing or otherwise explain why any permapressing operation, no matter how insubstantial, can never be incidental to any assembly process.

"respect[] the uniform construction which it is understood has been given by the treasury department . . . upon similar questions," 9 U.S. (5 Cranch) at 372, and reject the United States' new categorical interpretation of Section 10.16(c). At a minimum, Customs must explain this disparate treatment, which precludes this Court from deciding whether the regulation is reasonable on the current record.

C. The Solicitor General's Proposed Application Of 19 C.F.R. § 19.16(c) Here Is Unreasonable

Even if a categorical exclusion of permapressing operations could be reconciled with the plain language of the statute, the Solicitor General's proposed application of it to the facts of this case is arbitrary. The real issue here is not "permapressing," because the most significant step (given the regulations) in the permapressing process -- chemical treatment -- occurred in the United States. Pet. App. 8a-9a; J.A. 37-38, ¶¶ 48, 50. The only permapressing step that occurred abroad was curing -- the application of heat through pressing and ovenbaking. But it is clear that curing alone is not enough to make the permapressing regulation applicable, because it is undisputed both that Customs granted a duty allowance on Haggar's synthetic trousers, and that these pants were cured by the pressing done abroad. Pet. App. 8a, 16a; J.A. 33 ¶ 24, 48, 116; Tr. 74-75. If curing synthetic trousers is an operation incidental to assembly, then curing blended trousers should be so, too.

If there is any issue here, it is whether the use of *ovenbaking* in addition to pressing meaningfully distinguishes the curing operation used for blended fabric from the pressing operation used to cure synthetic fabric. On that issue, the regulations do not help Customs. Any attempt to analogize "ovenbaking" to the "chemical treatments" listed in section 10.16(c)(4) would be arbitrary. As noted above, it is plain that Customs does not consider applying heat to fabric in order to impart new characteristics to be a "chemical treatment," because it granted a duty allowance for synthetic pants that were pressed abroad in

order to achieve the "performance characteristics" associated with permanent press. *E.g.*, Pet. App. 8a; J.A. 33 ¶ 24, 48.

Indeed, if any regulation speaks to the issue, it is the regulation that specifically identifies "pressing" as an operation incidental to the assembly process. See 19 C.F.R. § 10.16(b)(7). Under the Solicitor General's categorical approach, any pressing operation that occurs after assembly should be deemed incidental. The post-curing operation that begins with pressing and is completed with oven-baking, Pet. App. 16a; J.A. 33, however, could be accomplished just as effectively -- although more expensively -- simply by pressing the pants for two or three extra minutes, and forgoing oven-baking altogether. J.A. 41-42, 57; Tr. at 79-87. Thus, the result of the Solicitor General's categorical approach is that a more expensive curing process (extended pressing) would automatically be deemed incidental to assembly, but a less expensive curing process (pressing plus oven-baking) is not -- even though each imparts the identical new characteristics and improved condition to the garment. This is precisely the sort of "absurd consequence[]," *Chrysler* Opp. 6, that caused the Solicitor General to reject the categorical approach to these regulations in *Chrysler*.

The Solicitor General's attempt to force this case into a pre-cast, inapt, permapressing slot is reminiscent of prior attempts by Customs to impose duties based on inflexible and arbitrary classifications. There, as here, the impermissible result was to make trivial distinctions between goods dispositive of a classification. In *Waite* v. *Macy*, 246 U.S. 606 (1918), this Court examined Customs regulations that established standards "of purity, quality, and fitness for consumption, of all kinds of tea imported," *id.* at 607 (citation omitted), but that Customs construed to bar the importation of high-quality, tea simply because it contained trace amounts of an innocuous food coloring. The Court concluded that the regulation, as interpreted by the Secretary, was arbitrary:

> Th[is] regulation makes the presence of any coloring matter an absolute ground for exclusion. But the only grounds recognized by the statute are inferiority to the standard in purity, quality, and fitness for consumption . . . . It cannot be made a rule of law that any tea that has an infinitesimal amount of innocuous coloring matter is inferior in those respects to a standard that has a much greater amount of other impurities and is worth only a quarter as much.

Id. at 609. *Accord Morrill* v. *Jones*, 106 U.S. 466, 467 (1883).

D. The Administrative Record Is Incomplete

A final, independent reason not to defer to these regulations is that the agency has lost the administrative record. Although the United States asserts that this case involves a "full-dress regulation" that "reflect[s] the agency's consideration of the 'numerous comments received,'" Pet. Br. 29 (quoting 40 Fed. Reg. 43,021 (1975)), those comments evidently were lost when the Treasury Department moved offices in 1988.[12] Thus, what is before the Court is not a record of "notice-and-comment" proceedings, but one of mere "notice and result."

The absence of an administrative record alone defeats the Solicitor General's claim for deference. It is axiomatic that "the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943). Without access to the comments, neither respondent nor this Court can assess whether the regulations reflect a reasoned

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[12] Respondent submitted a FOIA request for the relevant documents, and that request is pending. Prior to submitting that request, counsel for Haggar attempted to obtain a copy of the record directly from the Treasury Department's Public Affairs Office, the Office of Regulation and Rulings, and the Disclosure Law Office, but was told that the materials either were lost or destroyed. Ten copies of the FOIA request and of a letter documenting the reported loss of the record, and copies of other documents identified in the Table of Authorities and of Trial Transcript pages not in the Joint Appendix but cited herein, have been lodged with the Clerk.

response to the "numerous comments" that concededly were put before the agency. Accordingly, the regulations merit no deference. At the very least, this Court should remand for such further proceedings as may be appropriate to determine whether the administrative record may be recovered and, if so, to give respondent and the lower courts an opportunity to address it. See 28 U.S.C. § 2643(b) (authorizing the CIT to "order such further administrative . . . procedures as the court considers necessary to enable it to reach the correct decision").

* * * * *

The regulation at issue here, at least as interpreted by the Solicitor General in this case, conflicts with the statute and with the practice of the agency and prior interpretations of the Solicitor General. Its proposed application in this case is arbitrary, and its reasonableness more broadly cannot be definitively assessed because the agency cannot produce the administrative record that ostensibly formed the basis for the rule. The notion that this Court should affirm this regulation as reasonable under *Chevron* is thus completely unsustainable.

The unreasonableness of the regulation serves ultimately, however, to highlight a more fundamental point, which is that the lower courts gave this regulation all the deference that it was due -- none. Given the long history of attempts by Customs to foist unreasonable interpretations of classification statutes upon importers (see, *e.g.*, *Vowell & M'Clean; Cary* v. *Curtis* (Story, J., dissenting); *Waite v. Macy*), it is entirely understandable that Congress deliberately provided importers the right to a *de novo* trial to challenge classifications. That most "sweeping" form of judicial review moots any claim to deference to these regulations which, by congressional and executive design, were intended to bind only Customs officers and not the courts.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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APPENDICES

STATUTORY PROVISIONS

(United States Code)

19 U.S.C.

§ 66. Rules and forms prescribed by Secretary

The Secretary of the Treasury shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations not inconsistent with law, to be used in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to duties on imports, or to warehousing, and shall give such directions to customs officers and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law.

19 U.S.C.

§ 1502. Regulations for appraisement and classification

(a) Powers of Secretary of the Treasury

The Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with the law (including regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned), and may disseminate such information as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry. The Secretary may direct any customs officer to go from one port of entry to another for the purpose of appraising or classifying or assisting in appraising or classifying merchandise imported at any port, and may direct any customs officer at any port to review entries of merchandise filed at any other port.

(b) Duties of customs officers

It shall be the duty of all officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws; and in case any difficulty arises as to the true construction or meaning of any part of the revenue laws, the decision of the Secretary shall be binding upon all officers of the customs.

(c) Redesignated (b)

19 U.S.C.

§ 1514. Protest against decisions of Customs Service

(a) Finality of decisions; return of papers

Except as provided in subsection (b) of this section, section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by domestic interested parties), and section 1520 of this title (relating to refunds and errors), decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—

(1) the appraised value of merchandise;

(2) the classification and rate and amount of duties chargeable;

(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;

(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;

(5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;

(6) the refusal to pay a claim for drawback; or

(7) the refusal to reliquidate an entry under section 1520(c) of this title;

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of Title 28 within the time prescribed by section 2636 of that title. When a judgment or order of the United States Court of International Trade has become final, the papers transmitted shall be returned, together with a copy of the judgment or order to the Customs Service, which shall take action accordingly.

(b) Finality of determinations

With respect to determinations made under section 1303 of this title or subtitle IV of this chapter which are reviewable under section 1516a of this title, determinations of the Customs Service are final and conclusive upon all persons (including the United States and any officer thereof) unless a civil action contesting a determination listed in section 1516a of this title is commenced in the United States Court of International Trade, or review by a binational panel of a determination to which section 1516a(g)(2) of this title applies is commenced pursuant to section 1516a(g) of this title and article 1904 of the North American Free Trade Agreement or the United States—Canada Free—Trade Agreement.

(c) Form, number, and amendment of protest; filing of protest

(1) A protest of a decision made under subsection (a) of this section shall be filed in writing, or transmitted electronically pursuant to an electronic data interchange system, in accordance with regulations prescribed by the Secretary. A protest must set forth distinctly and specifically—

(A) each decision described in subsection (a) of this section as to which protest is made;

(B) each category of merchandise affected by each decision set forth under paragraph (1);

(C) the nature of each objection and the reasons therefor; and

(D) any other matter required by the Secretary by regulation.

Only one protest may be filed for each entry of merchandise, except that where the entry covers merchandise of different categories, a separate protest may be filed for each category. In addition, separate protests filed by different authorized persons with respect to any one category of merchandise, or with respect to a determination of origin under section 3332 of this title, that is the subject of a protest are deemed to be part of a single protest. A protest may be amended, under regulations prescribed by the Secretary, to set forth objections as to a decision or decisions described in subsection (a) of this section which were not the subject of the original protest, in the form and manner prescribed for a protest, any time prior to the expiration of the time in which such protest could have been filed under this section. New grounds in support of objections raised by a valid protest or amendment thereto may be presented for consideration in connection with the review of such protest pursuant to section 1515 of this title at any time prior to the disposition of the protest in accordance with that section.

(2) Except as provided in sections 1485(d) and 1557(b) of this title, protests may be filed with respect to merchandise

which is the subject of a decision specified in subsection (a) of this section by—

(A) the importers or consignees shown on the entry papers, or their sureties;

(B) any person paying any charge or exaction;

(C) any person seeking entry or delivery;

(D) any person filing a claim for drawback;

(E) with respect to a determination of origin under section 3332 of this title, any exporter or producer of the merchandise subject to that determination, if the exporter or producer completed and signed a NAFTA Certificate of Origin covering the merchandise; or

(F) any authorized agent of any of the persons described in clauses (A) through (E).

(3) A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with the Customs Service within ninety days after but not before—

(A) notice of liquidation or reliquidation, or

(B) in circumstances where subparagraph (A) in inapplicable, the date of the decision as to which protest is made.

A protest by a surety which has an unsatisfied legal claim under its bond may be filed within 90 days from the date of mailing of notice of demand for payment against its bond. If another party has not filed a timely protest, the surety's protest shall

certify that it is not being filed collusively to extend another authorized person's time to protest as specified in this subsection.

(d) Limitation on protest of reliquidation

The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the Customs Service upon any question not involved in such reliquidation.

(e) Advance notice of certain determination

Except as provided in subsection (f) of this section, an exporter or producer referred to in subsection (c)(2)(E) of this section shall be provided notice in advance of an adverse determination of origin under section 3332 of this title. The Secretary may, by regulations, prescribe the time period in which such advance notice shall be issued and authorize the Customs Service to provide in the notice the entry number and any other entry information considered necessary to allow the exporter or producer to exercise the rights provided by this section.

(f) Denial of preferential treatment

If the Customs Service finds indications of a pattern of conduct by an exporter or producer of false or unsupported representations that goods qualify under the rules of origin set out in section 3332 of this title—

(1) the Customs Service, in accordance with regulation issued by the Secretary, may deny preferential tariff treatment to entries of identical goods exported or produced by that person; and

(2) the advance notice requirement in subsection (e) of this section shall not apply to that person;

until the person establishes to the satisfaction of the Customs Service that its representations are in conformity with section 3332 of this title.

19 U.S.C.

§ 1515. Review of protests

(a) Administrative review within two years

Unless a request for an accelerated disposition of a protest is filed in accordance with subsection (b) of this section the appropriate customs officer, within two years from the date a protest was filed in accordance with section 1514 of this title, shall review the protest and shall allow or deny such protest in whole or in part. Thereafter, any duties, charge, or exaction found to have been assessed or collected in excess shall be remitted or refunded and any drawback found due shall be paid. Upon the request of the protesting party, filed within the time allowed for the filing of a protest under section 1514 of this title, a protest may be subject to further review by another appropriate customs officer, under the circumstances and in the form and manner that may be prescribed by the Secretary in regulations, but subject to the two-year limitation prescribed in the first sentence of this subsection. Notice of the denial of any protest shall be mailed in the form and manner prescribed by the Secretary. Such notice shall include a statement of the reasons for the denial, as well as a statement informing the protesting party of his right to file a civil action contesting the denial of a protest under section 1514 of this title.

(b) Request for accelerated disposition

A request for accelerated disposition of a protest filed in accordance with section 1514 of this title may be mailed by certified or registered mail to the appropriate customs officer any time after ninety days following the filing of such protest. For purposes of section 1581 of Title 28, a protest which has not been allowed or denied in whole or in part within thirty

days following the date of mailing by certified or registered mail of a request for accelerated disposition shall be deemed denied on the thirtieth day following mailing of such request.

(c) Request for set aside of denial of further review

If a protesting party believes that an application for further review was erroneously or improperly denied or was denied without authority for such action, it may file with the Commissioner of Customs a written request that the denial of the application for further review be set aside. Such request must be filed within 60 days after the date of the notice of the denial. The Commissioner of Customs may review such request and, based solely on the information before the Customs Service at the time the application for further review was denied, may set aside the denial of the application for further review and void the denial of protest, if appropriate. If the Commissioner of Customs fails to act within 60 days after the date of the request, the request shall be considered denied. All denials of protests are effective from the date of original denial for purposes of section 3626 of Title 28. If an action is commenced in the Court of International Trade that arises out of a protest or an application for further review, all administrative action pertaining to such protest or application shall terminate and any administrative action taken subsequent to the commencement of the action is null and void.

(d) Voiding denial of protest

If a protest is timely and properly filed, but is denied contrary to proper instructions, the Customs Service may on its own initiative, or pursuant to a written request by the protesting party filed with the appropriate port director within 90 days after the date of the protest denial, void the denial of the protest.

19 U.S.C.

§ 3005. Commission review of, and recommendations regarding, the Harmonized Tariff Schedule

(a) In general

The Commission shall keep the Harmonized Tariff Schedule under continuous review and periodically, at such time as amendments to the Convention are recommended by the Customs Cooperation Council for adoption, and as other circumstances warrant, shall recommend to the President such modifications in the Harmonized Tariff Schedule as the Commission considers necessary or appropriate—

(1) to conform the Harmonized Tariff Schedule with amendments made to the Convention;

(2) to promote the uniform application of the Convention and particularly the Annex thereto;

(3) to ensure that the Harmonized Tariff Schedule is kept up-to-date in light of changes in technology or in patterns of international trade;

(4) to alleviate unnecessary administrative burdens; and

(5) to make technical rectifications.

(b) Agency and public views regarding recommendations

In formulating recommendations under subsection (a) of this section, the Commission shall solicit, and give consideration to, the views of interested Federal agencies and

the public. For purposes of obtaining public views, the Commission—

(1) shall give notice of the proposed recommendations and afford reasonable opportunity for interested parties to present their views in writing; and

(2) may provide for a public hearing.

(c) Submission of recommendations

The Commission shall submit recommendations under this section to the President in the form of a report that shall include a summary of the information on which the recommendations were based, together with a statement of the probable economic effect of each recommended change on any industry in the United States. The report also shall include a copy of all written views submitted by interested Federal agencies and a copy or summary, prepared by the Commission, of the views of all other interested parties.

(d) Requirements regarding recommendations

The Commission may not recommend any modification to the Harmonized Tariff Schedule unless the modification meets the following requirements:

(1) The modification must—

(A) be consistent with the Convention or any amendment thereto recommended for adoption;

(B) be consistent with sound nomenclature principles; and

(C) ensure substantial rate neutrality.

(2) Any change to a rate of duty must be consequent to, or necessitated by, nomenclature modifications that are recommended under this section.

(3) The modifications must not alter existing conditions of competition for the affected United States industry, labor, or trade.

19 U.S.C.

§ 3006. Presidential action on Commission recommendations

(a) In general

The President may proclaim modifications, based on the recommendations by the Commission under section 3005 of this title, to the Harmonized Tariff Schedule if the President determines that the modifications—

(1) are in conformity with United States obligations under the Convention; and

(2) do not run counter to the national economic interest of the United States.

(b) Lay-over period

(1) The President may proclaim a modification under subsection (a) of this section only after the expiration of the 60-day period beginning on the date on which the President submits a report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate that sets forth the proposed modification and the reasons therefor.

(2) The 60-day period referred to in paragraph (1) shall be computed by excluding—

(A) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain or an adjournment of the Congress sine die; and

(B) any Saturday and Sunday, not excluded under subparagraph (A), when either House is not in session.

(c) Effective date of modifications

Modifications proclaimed by the President under subsection (a) of this section may not take effect before the 15th day after the date on which the text of the proclamation is published in the Federal Register.

28 U.S.C.

§ 1581. Civil actions against the United States and agencies and officers thereof

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Action of 1930.

(b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Action of 1930.

(c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Action of 1930.

(d) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act;

(2) any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act; and

(3) any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act.

(e) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of the Treasury under section 305(b)(1) of the Trade Agreement Act of 1979.

(f) The Court of International Trade shall have exclusive jurisdiction of any civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930.

(g) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any decision of the Secretary of the Treasury to deny a customs broker's license under section 641(b)(2) or (3) of the Tariff Act of 1930, or to deny a customs broker's permit under section 641(c)(1) of such Act, or to revoke a license or permit under section 641(b)(5) or (c)(2) of such Act;

(2) any decision of the Secretary of the Treasury to revoke or suspend a customs broker's license or permit, or impose a monetary penalty in lieu thereof, under section 641(d)(2)(B) of the Tariff Act of 1930; and

(3) any decision or order of the Customs Service to deny, suspend, or revoke accreditation of a private laboratory under Section 499(b) of the Tariff Act of 1930.

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty,

marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the court of International Trade under section 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the North American Free Trade

Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

(j) The Court of International Trade shall not have jurisdiction of any civil action arising under section 305 of the Tariff Act of 1930.

28 U.S.C.

§ 2638. New grounds in support of a civil action

In any civil action under section 515 of the Tariff Act of 1930 in which the denial, in whole or in part, of a protest is a precondition to the commencement of a civil action in the Court of International Trade, the court, by rule, may consider any new ground in support of the civil action if such new ground—

(1) applies to the same merchandise that was the subject of the protest; and

(2) is related to the same administrative decision listed in section 514 of the Tariff Act of 1930 that was contested in the protest.

28 U.S.C.

§ 2640. Scope and standard of review

(a) The Court of International Trade shall make its determinations upon the basis of the record made before the court in the following categories of civil actions:

(1) Civil actions contesting the denial of a protest under section 515 of the Tariff Act of 1930.

(2) Civil actions commenced under section 516 of the Tariff Act of 1930.

(3) Civil actions commenced to review a final determination made under section 305(b)(1) of the Trade Agreements Act of 1979.

(4) Civil actions commenced under section 777(c)(2) of the Tariff Act of 1930.

(5) Civil actions commenced to review any decision of the Secretary of the Treasury under section 641 of the Tariff Act of 1930, with the exception of decisions under section 641(d)(2)(B), which shall be governed by subdivision (d) of this section.

(6) Civil actions commenced under section 1582 of this title.

(b) In any civil action commenced in the Court of International Trade under section 516A of the Tariff Act of 1930, the court shall review the matter as specified in subsection (b) of such section.

(c) In any civil action commenced in the Court of International Trade to review any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 or any final determination of the Secretary of Commerce under section 251 or section 271 of such Act, the court shall review the matter as specified in section 284 of such Act.

(d) In any civil action commenced to review any order or decision of the Customs Service under section 499(b) of the Tariff Act of 1930, the court shall review the action on the basis of the record before the Customs Service at the time of issuing such decision or order.

(e) In any civil action not specified in this section, the Court of International Trade shall review the matter as provided in section 706 of title 5.

28 U.S.C.

§ 2641. Witnesses; inspection of documents

(a) Except as otherwise provided by law, in any civil action in the Court of International Trade, each party and its counsel shall have an opportunity to introduce evidence, to hear and cross-examine the witnesses of the other party, and to inspect all samples and papers admitted or offered as evidence, as prescribed by the rules of the court. Except as provided in section 2639 of this title, subsection (b) of this section, or the rules of the court, the Federal Rules of Evidence shall apply to all civil actions in the Court of International Trade.

(b) The Court of International Trade may order that trade secrets and commercial or financial information which is privileged and confidential, or any information provided to the United States by any foreign government or foreign person, may be disclosed to a party, its counsel, or any other person under such terms and conditions as the court may order.

28 U.S.C.

§ 2645. Decisions

(a) A final decision of the Court of International Trade in a contested civil action or a decision granting or refusing a preliminary injunction shall be supported by—

(1) a statement of findings of fact and conclusions of law; or

(2) an opinion stating the reasons and facts upon which the decision is based.

(b) After the Court of International Trade has rendered a judgment, the court may, upon the motion of a party or upon its own motion, amend its findings or make additional findings and may amend the decision and judgment accordingly. A motion of a party or the court shall be made not later than thirty days after the date of entry of the judgment.

(c) A decision of the Court of International Trade is final and conclusive, unless a retrial or rehearing is granted pursuant to section 2646 of this title or an appeal is taken to the Court of Appeals for the Federal Circuit by filing a notice of appeal with the clerk of the Cour of International Trade within the time and in the manner prescribed for appeals to United States courts of appeals from the United States district courts.

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No. 97-2044

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

v.

HAGGAR APPAREL CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

I. *The Treasury regulations issued under the Tariff Act are entitled to deference in determining the proper tariff classification of imported goods.*

1. The sole rationale offered by the court of appeals for holding that the Treasury regulations that interpret the classification provisions of the Tariff Act "are entitled to [no] deference" (Pet. App. 3a) is that 28 U.S.C. 2643(b) directs the Court of International Trade to "reach the correct decision" in cases within its jurisdiction (Pet. App. 4a). For the reasons explained in detail in our opening brief, that reasoning is plainly incorrect. Respondent acknowledges this by declining to make any effort in this Court to support or defend the reasoning of the courts below. The text and history of 28 U.S.C. 2643(b) confirm that it is nothing more than a procedural device that permits the Court of Inter-

national Trade to remand a case to the agency for further administrative proceedings when appropriate.[1] See U.S. Br. 17. Nothing in that procedural statute supports the conclusion of the courts below that the Court of International Trade is to "ignore[] the regulation altogether" (Pet. App. 23a) in tariff classification cases. See U.S. Br. 15-18.

2. Having abandoned the rationale of the courts below, respondent seeks to rely on a different theory in this Court. Respondent contends that, because the Court of International Trade is to make a "de novo" determination of the factual issues involved in classification decisions, the court is to give no deference to agency interpretations or regulations in determining and applying the applicable law. That new theory—like the now abandoned theory that respondent urged below—is fundamentally flawed.

(a) Respondent complains that it "is nothing short of startling" (Resp. Br. 15) that the government—like the courts below—has not addressed the language of 28 U.S.C. 2640(b). That statute specifies that, in tariff protest cases, the Court of International Trade is to "make its determinations upon the basis of the record made before the court" (28 U.S.C. 2640(a)). Respondent asserts that this statutory

[1] Respondent does not even cite this procedural statute until the last page of its brief, where it states that 28 U.S.C. 2643(b) authorizes a remand for "further proceedings" in this case (Resp. Br. 50). *Amici* Anhydrides & Chemicals, Inc., et al., similarly acknowledge that this statute is only "a provision for evidentiary remand" (Am. Br. 22). See also U.S. Br. 17 n.5. *Amicus* Customs and International Trade Bar Ass'n suggests (Am. Br. 20) that it is unusual for a statute expressly to confer a duty on a court to reach a "correct decision." The statute, however, does not impose a "duty" to reach a "correct decision"; it merely authorizes a remand when doing so is "necessary to enable it to reach the correct decision." 26 U.S.C. 2643(b). There is nothing unusual in a remand procedure of this type. As Congress noted, this provision merely gives the Court of International Trade a "remand power * * * co-extensive with that of a federal district court." H.R. Rep. No. 1235, 96th Cong., 2d Sess. 60 (1980).

provision, which merely directs the Court of International Trade to decide all questions of *fact* in "a trial *de novo*" on the record assembled in that court (S. Rep. No. 466, 96th Cong., 1st Sess. 18-19 (1979)), somehow also directs the Court of International Trade to decide all questions of law without affording any deference to the Treasury regulations that interpret and implement the Tariff Act.

This extraordinary contention is utterly unsupported. By requiring "a trial *de novo*" (Resp. Br. 17) in the Court of International Trade, the statute merely places customs cases in that court on precisely the same footing on which all *other* types of tax cases are adjudicated in the Tax Court, the Court of Federal Claims, and the federal district courts.[2] In tax cases that arise under the Internal Revenue Code, as in customs cases that arise under the Tariff Act, an enforcement agency within the Treasury Department makes an administrative determination of the amount of tax due. See 26 U.S.C. 6212 (determination of deficiency). That

[2] The history of the origins of the Court of International Trade recounted in respondent's brief (Resp. Br. 4-5) parallels, of course, the history of the origins of the Tax Court. Both of these specialized tribunals began as administrative components of the Treasury Department. When they were established as courts independent from that agency, they were given the responsibility of making findings of fact based on the record assembled in the cases tried before them. See 26 U.S.C. 7459(b); H. Dubroff, *The United States Tax Court: An Historical Analysis* 35-60, 165-215, 307-314, 334-339 (1979). Proceedings in the Tax Court on tax deficiencies determined by the Internal Revenue Service, like the proceedings in the Court of International Trade on customs protests, are "unlike judicial review of the actions of other agencies [in that] any 'record' made in the Service, including the reasons for its assessment, is irrelevant. The action involves a de novo determination of the correct tax and is not a review of the administrative processing of the case." M.I. Saltzman, *IRS Practice and Procedure* ¶ 1.05[2][a], at 1-31 (2d ed. 1991). See also 26 U.S.C. 7482(a)(1) (decisions of the Tax Court are reviewed in the courts of appeals "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury").

administrative determination is then reviewed in the courts: (a) for internal revenue cases, it is reviewed in the Tax Court or in a refund suit brought in the Court of Federal Claims or the federal district courts; (b) for customs cases, it is reviewed in the Court of International Trade. In determining the proper amount of taxes or duties due, *all* of those courts are to make "de novo" findings of fact based only on the "record made before the court" (28 U.S.C. 2640(a)); and, in applying the applicable law to those findings, these courts are to make an independent determination of the law. See note 2, *supra*. In making such "de novo" determinations of fact and law, however, these courts have consistently been directed to defer to the formal interpretations of the applicable law adopted by the Treasury Department under these statutes.[3] This Court has specifically held in these cases that "the task that confronts [the courts] is to decide, not whether the Treasury regulation represents the best interpretation of the statute, but whether it represents a reasonable one." *Atlantic Mut. Ins. Co.* v. *Commissioner*, 118 S. Ct. 1413, 1418 (1998) (review of Tax Court decision in tax case). Accord, *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979) (review of federal district court decision in tax case); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978) (review of Customs Court decision in customs case).

These courts are unquestionably the sole finders of fact in each of these various types of tax cases. Like all other courts, including this Court, these courts are also to determine all questions of law "de novo" in the cases that

[3] Respondent mistakenly implies (Resp. Br. 35) that the regulations involved in this case were issued by the Customs Service rather than by the Treasury Department. As we have explained (U.S. Br. 13 n.3), the authority to issue regulations under the Tariff Act is vested in the Secretary of the Treasury. The regulation challenged in this case became effective only upon "the approval of the Secretary of the Treasury." Treas. Dep't Order No. 165, Treas. Dec. 53160 (Dec. 15, 1952).

come before them.[4] In making these independent legal determinations, however, it is well established that these courts are to defer to the agency's regulatory interpretation if it is "reasonable." *Zenith Radio Corp.* v. *United States*, 437 U.S. at 450. In a case that arose in the predecessor of the Court of International Trade, this Court held that that court (like the Tax Court and the district courts in other tax cases) should "show[] great deference to the interpretation given the statute by the officers or agency charged with its administration." *Ibid.*[5] See also U.S. Br. 20-21. Nothing in respondent's newly asserted contentions addresses these fundamental and well-established rules.[6]

[4] In its decision below, the court of appeals merely noted this ordinary rule in stating that, "[o]n appeal, we review the findings of [the court below]—not those of Customs for—clear error; while we decide questions of law *de novo*" (Pet. App. 4a).

[5] Addressing this controlling decision only in a footnote, respondent asserts that the holding in *Zenith Radio* that the Customs Court is to defer to the agency's reasonable interpretations of the Tariff Act is not pertinent here because (i) that case "predates the 1980 Act" and (ii) it "involved countervailing duties, which have sensitive foreign policy implications" (Resp. Br. 28 n.6). Those purported distinctions are plainly of no consequence. Respondent does not claim that the 1980 Act *changed* the degree of deference to which Treasury regulations are entitled in tariff protest cases; instead, respondent claims that the 1980 Act "preserved" the prior rule (Resp. Br. 6). Moreover, in *Zenith Radio* the Court merely applied to customs cases the principle of deference that applies to all formal interpretations issued by the "agency charged with * * * administration" of the statute (437 U.S. at 450). That holding, of course, applies as directly here as it did in *Zenith Radio*. The Court did not suggest, much less hold, in *Zenith Radio* that such ordinary interpretive principles apply only when "sensitive foreign policy" issues are involved.

[6] Chief Judge Re of the Court of International Trade articulated this same principle in describing the deference owed to Treasury interpretations of the Tariff Act in the *Proceedings of the Fifth Annual Judicial Conference of the United States Court of International Trade*, 126 F.R.D. 335, 337-338 (1988). He noted that, even though the court is "the final authority on issues of statutory construction," deference must be

(b) Ignoring these settled principles, respondent argues that, in situations where "Congress has provided that a party's liability under a statute would be determined in an independent judicial trial, courts consistently have refused to accord *Chevron* deference even to 'full dress' regulations promulgated pursuant to a grant of substantive rulemaking power" (Resp. Br. 26 (citation omitted)). That extraordinary contention is plainly incorrect. The tax and customs cases already cited directly refute respondent's assertion. Moreover, *Chevron* deference routinely applies in cases (such as the present one) in which the court is to determine the facts *de novo* and is to make an independent determination of the applicable law. See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739-741 (1996) (damages suit in state court claiming that late payment charges were prohibited "interest"); *Auer* v. *Robbins*, 519 U.S. 452, 456-458 (1997) (private suit for overtime pay); *United States* v. *O'Hagan*, 117 S. Ct. 2199, 2218 (1997) (criminal case). Whenever, in such cases, the formal interpretation of a statute by the agency charged with the responsibility of administering that statute is placed in question, the *Chevron* standard has consistently been applied by this Court. See also, *e.g.*, *Blum* v. *Bacon*, 457 U.S. 132, 141 (1982); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

Indeed, the very decision that respondent cites as the "leading case" (Resp. Br. 26) for its erroneous proposition makes this exact point. In *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638 (1990), the Court declined to accord *Chevron* deference to a regulation that purported to interpret the scope of the jurisdiction of the courts in direct private actions brought under the statutory enforcement scheme involved in

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given to Treasury interpretations in customs cases because "[i]t is axiomatic that a court must accord due weight to an administrative agency's interpretation of a statute that the legislature has directed the agency to administer." *Ibid.*

that case. The Court declined to afford *Chevron* deference to that regulation because "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority" and "[n]o such delegation" of authority to interpret the "enforcement" authority of the *courts* had been made to the agency in that case. *Id.* at 649, 650. By contrast, however, the Court emphasized that the agency's power to interpret the *substantive* provisions of the statute remained fully in place. The Court noted that the statute "clearly envisioned, indeed expressly mandated, a role for the [agency] in administering the statute" to "promulgate *standards* implementing" the substantive statutory scheme. *Id.* at 650. The court emphasized that, even though the sole enforcement authority had been vested in the courts, the "determinations [made by the agency] within the scope of [its] delegated authority are entitled to deference." *Ibid.*

No other authority is cited by respondent to support its radical contention that courts are not "to defer to the agency's statutory construction even where the construction is embodied in regulations and even where the agency otherwise possesses substantive rulemaking power" (Resp. Br. 27).[7] The "leading" decision that respondent cites makes clear that, even in situations in which the agency lacks

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[7] The only other case that respondent cites in connection with this contention (Resp. Br. 26-27) is *Sims* v. *Department of Agriculture*, 860 F.2d 858 (8th Cir. 1988). That case also provides no support for the proposition that agency regulations have no weight in judicial enforcement proceedings. In *Sims*, the agency took the position that the "guidelines" it had issued were not binding because they were *not* issued as interpretive regulations. *Id.* at 861. The court concluded that it was unnecessary to decide whether the guidelines were binding "regulations" because the agency had not "depart[ed]" from them. The court further noted that, while such "guidelines" would not be "binding on the court in making its de novo review," they were nonetheless "helpful in interpreting the law and regulations." *Id.* at 863. This decision obviously provides no support for respondent's sweeping proposition that formal interpretive regulations are entitled to no deference in judicial enforcement proceedings.

enforcement authority under the statute, the agency's formal interpretations of the substantive provisions of the statute that it administers "are entitled to deference" in the courts. *Adams Fruit Co.* v. *Barrett*, 494 U.S. at 650. See also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). Indeed, it is precisely in such judicial enforcement cases that this Court has emphasized that "[i]t is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering." *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 739.

(c) Respondent contends (Resp. Br. 20-21) that *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), provides implicit support for a rule that agency legal interpretations are entitled to no deference when enforcement disputes are subject to a *de novo* trial in federal court. Nowhere in that case or elsewhere, however, has the Court articulated any such proposition. In *Reporters Committee*, the Court simply referred to the court's statutory responsibility in a Freedom of Information Act case to "determine the matter do novo" (5 U.S.C. 552(a)(4)(B)) in describing its obligation to make an independent determination of the disclosure issues presented under that statute. 489 U.S. at 755, 776. Nothing in that case purports to establish that, in every type of federal enforcement case in which courts are to hold trials, the regulations issued by the agency under statutes that they administer are to be ignored by a reviewing court.

Other similar cases cited by respondent (Resp. Br. 22-23) are likewise inapposite.[8] For example, this Court's decision

[8] The other decisions that respondent cites (Resp. Br. 22-24) are similar to *Reporters Committee* in that they also involve the application of the FOIA. As Justice (then Chief Judge) Breyer stated in one of the decisions that respondent cites, the distinctive feature of the FOIA is that the statute imposes obligations on the agencies that are administered by the courts. It is thus different from the "ordinar[y]" situation in which "a court would give special weight to the agency's interpretation of the language of the statute * * * the agency administers." *Aronson* v. *IRS*, 973 F.2d 962, 965 (1st Cir. 1992). Indeed, the FOIA applies to a multitude of agencies. By contrast, as this Court emphasized in *Zenith Radio*, it is the "ordinary" rule that applies to the Treasury Department's interpretation of the Tariff Act, for courts are to "show[] great deference to the interpretation given the statute by the officers or agency charged with its administration." 437 U.S. at 450.

The present case also does not involve "de novo" review of agency findings under the Administrative Procedure Act. Under the APA, although "de novo" review "allows the court to make independent findings of fact," only "decisions which are clearly erroneous or unwarranted by the facts may be overturned" (6 J. Stein, et al., *Administrative Law* § 51.04, at 51-151 (1998)). Actions involving customs and other taxes do not arise under the APA and are not based upon review of the administrative record. See note 2, *supra*.

in *United States* v. *First City National Bank*, 386 U.S. 361 (1967), does not address or consider the degree of deference owed to agency regulations. The issue in *First City National Bank* was solely "the procedural" question whether the determination of the Comptroller in a bank merger dispute is subject to review under a substantial evidence standard or is instead to be reviewed de novo by the district court. *Id.* at 369 n.1. The Court held that the determination made by the Comptroller is to be reviewed *de novo*, as the applicable statute expressly required. *Id.* at 368. Contrary to the suggestion of respondent's brief (Resp. Br. 22), the Court did not depart from the established rule that, in making an independent determination of the applicable law, courts are to defer to formal statutory interpretations issued by the agency charged by Congress "with responsibility for administering the provision" (*Chevron*, 467 U.S. at 865). That issue was simply not addressed in that case. Indeed, the Court expressly declined to express any "views on the merits" in *First City National Bank* and stated that "[a]ll

questions except the procedural ones treated in the opinion are reserved." 386 U.S. at 369 n.1.

3. Raising further new contentions, respondent argues that Congress has authorized the Treasury to issue only two specific types of rules: (i) rules "that bind * * * customs officers" and (ii) rules that establish procedures for importers to follow "in bringing goods into the country and preserving their claims" (Resp. Br. 28). Respondent advances no authority for this proposition and, indeed, no decision could be cited to support it. Respondent instead relies solely upon a cramped and inaccurate exposition of the simple language of the statutory provisions.

(a) The various delegations of authority that Congress made under the Tariff Act are set forth in detail in our opening brief (U.S. Br. 12-13 & n.2). The most general of these provisions state that "[t]he Customs Service shall, under rules and regulations prescribed by the Secretary * * * fix the final classification and rate of duty applicable to such merchandise" (19 U.S.C. 1500(b)) and, in turn, that "[t]he Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with the law * * * to secure a just, impartial, and uniform appraisement of imported merchandise and the *classification* and assessment of duties thereon at the various ports of entry" (19 U.S.C. 1502(a) (emphasis added)). The relevant legislative history, which respondent has ignored, states that Congress understood that, under these provisions, "[t]he Customs Service will be responsible for interpreting and applying the[ ] Harmonized Tariff Schedules of the United States" (U.S. Br. 13 n.2, quoting H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988)).[9] Indeed, respondent ultimately acknowledges that, in enacting these provisions, Congress granted express authority to the agency to interpret the classification provisions of the Tariff Act. Respondent asserts nonetheless that, because the statute authorizes the agency to interpret the classification provisions "*at the various ports of entry*" (19 U.S.C. 1502(a) (emphasis added)), the agency's regulations should be binding *only* on customs officers and should have no effect on importers or the courts (Resp. Br. 30).

That strained contention, which is unsupported by any authority, ignores the fact that customs duties only *arise* when the merchandise has "arrived at the port of entry." *United States* v. *Vowell and M'Clean*, 9 U.S. (5 Cranch) 368, 372 (1809).[10] The fact that the agency's regulations address

[9] Respondent cites a 1960 study that it asserts is part of the "legislative history of Headnote 11" of the HTSUS (Resp. Br. 32-33). The isolated extracts that respondent quotes from that study note that customs officers will need "instructions" under the Tariff Act because they lack discretion "in determining a tariff classification" and must "enforce the tariff laws as enacted by the Congress" (*ibid.* (emphases omitted)). Whatever meaning is to be attributed to these ambiguous extracts from the 1960 study, it is manifest that Congress itself intended that, in performing this enforcement function, the Treasury would be "responsible for interpreting and applying the[ ] Harmonized Tariff Schedules of the United States." H. R. Conf. Rep. No. 576, *supra*, at 549.

Moreover, while respondent suggests that the rulemaking power that is expressly granted to the Treasury under Headnote 11 of the TSUS is limited to rules relating to "the physical movement of goods" (Resp. Br. 31), respondent ultimately acknowledges (*id.* at 31-32) that this Headnote also authorizes the Treasury to adopt rules for the classification of goods when—as in the present case—the "importer's claim for classification" cannot be determined from a physical "examination of the article itself in its condition as imported" (General Headnote 11 of the TSUS, 19 U.S.C. 1202 (1982)). That provision applies directly here, for a customs inspector would not know, merely by inspecting an article in the condition imported, whether improvements had been made abroad in a manner "incidental to assembly."

[10] It was in *Vowell and M'Clean* that Chief Justice Marshall emphasized for the Court that, when a question of interpretation of tariff legislation is "doubtful," courts are to "respect[] the uniform construction which it is understood has been given by the treasury department of the United States." 9 U.S. (5 Cranch) at 372. Respondent correctly notes

"classification * * * at the various ports of entry" (19 U.S.C. 1502(a)) stems from that simple fact. Respondent's novel contention that Congress empowered the Secretary to issue "regulations" that apply only to customs officers and to no one else is plainly insubstantial.[11] The Secretary does not require a statutory authority to adopt "regulations" merely to give instructions to the Department's employees; and a "regulation" cannot serve to clarify the law if it has no bearing for the public or the courts.

(b) Respondent nonetheless asserts that the agency's regulations themselves manifest an intent that no one but customs officers be bound by them. Respondent notes that, in setting forth "the constructions and interpretations that the United States Customs Service shall give to relevant statutory terms," the regulations emphasize that they do not, in any fashion, "restrict the legal right of importers or others to a judicial review of the matters contained therein." 19 C.F.R. 10.11(a). That statement in the regulations is both factually correct and consistent with this Court's decisions. It is factually correct because nothing in the regulations *does* restrict or "purport[]" to restrict "the legal right of importers" to "judicial review of the matters contained" in the

(Resp. Br. 46) that the Court applied that principle of deference in *Vowell and M'Clean* to govern a situation in which the agency, thinking the facts of that case supported a different rule, had applied a different construction. The Court concluded that the facts did not support a different rule and that the Treasury's established rule would have been applicable to that case as well if the question had been "doubtful." 9 U.S. (5 Cranch) at 372.

[11] Nor does the fact that the decisions of the Secretary in customs disputes are expressly "binding upon" customs officers (19 U.S.C. 1502(b)) mean, as respondent asserts (Resp. Br. 30-31), that the agency's regulations are binding on no one else. The provisions of subsection (b) instead ensure that customs officers make their determinations under the same regulations that the Secretary issues under Section 1502(a) to guide the public generally.

regulation. *Ibid.* For example, this very case involves precisely such judicial review.

Moreover, as this Court emphasized in *Adams Fruit Co.* v. *Barrett*, 494 U.S. at 649-650, an agency's regulations cannot repeal a right of judicial review that Congress has established by statute. As the Court further held in that case, however, the fact that such judicial review occurs does not deprive the agency's interpretations of the substantive provisions of the statute of meaning. *Ibid.* Instead, as this Court has held on numerous occasions, including in prior customs cases, deference is owed to the agency's "reasonable" interpretations of the substantive provisions of the statute that it administers. *Zenith Radio*, 437 U.S. at 450; Pet. Br. 20-21.

The lengthy string of cases in which the agency has litigated the question of the deference owed to its tariff classification regulations (see U.S. Br. 18 n.7), along with the prior, acknowledged responsibility of the Court of International Trade to "defer to the agency's [reasonable] interpretation of the statute" (Chief Judge Edward D. Re, *Litigation Before the United States Court of International Trade*, 19 U.S.C.A. §§ 1-1300, at XLI (West. Supp. 1998)), evidence that the agency has consistently taken the position that its regulations are binding on importers.[12] Respondent's contention that the agency misunderstands the effect of its own regulation is implausible because, as respondent acknowledges elsewhere, "very great deference is paid to an agency's interpretation of its own regulations" (Resp. Br. 36, citing *Udall* v. *Tallman*, 380 U.S. at 16-17).

[12] Both the agency and the courts have long understood that Treasury regulations apply to importers as well as customs officers. See, *e.g.*, *Proceedings of the Fifth Annual Judicial Conference of the United States Court of International Trade*, 126 F.R.D. 335, 337-338 (1988) (discussing deference owed to the agency's regulations in the customs protest cases brought by importers in that court).

Amicus Customs and International Trade Bar Association offers a wholly different view of the significance of the reference in the regulation to the availability of "judicial review of the matters contained therein" (19 C.F.R. 10.11(a)). That *amicus* asserts that this statement is an "explicit recognition" by the Treasury that it was adopting "an 'interpretive rule,' as opposed to a legislative rule'" (Am. Br. 29). But, whether characterized as interpretive or legislative, the courts are plainly not to "ignore[ ] the regulation altogether" (Pet. App. 23a). Instead, as this Court explained in *Chevron*, 467 U.S. at 843-844, under either characterization, the agency's interpretations are entitled to significant deference. When "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," the "regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Ibid.* When the agency's authority to interpret the statute is only "implicit rather than explicit," and flows merely from the inherent need to make "rules to fill any gap" left in the statute by Congress, the Court has emphasized that a reviewing court is to defer to "a reasonable interpretation made by the administrator of an agency." *Ibid.*

4. *Amici* Anhydrides & Chemicals, Inc., et al., contend that deference to Treasury interpretations of customs legislation is inappropriate because, under the "rule of lenity," any ambiguity in the statute should be resolved in favor of the importer (Am. Br. 4-29). As the *amici* note, the rule of lenity has long been applied to cases involving customs duties and to all other forms of federal taxation as well (Am.

Br. 9-10). But here, as in *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995), *amici* "misconstrue[ ]the doctrine" of lenity:

> A statute is not "'ambiguous' for purposes of lenity merely because" there is "a division of judicial authority" over its proper construction. *Moskal* v. *United States*, 498 U.S. 103, 108 (1990). The rule of lenity applies only if, "after seizing everything from which aid can be derived," *Smith* v. *United States*, 508 U.S. 223, 239 (1993)(internal quotation marks and brackets omitted), we can make "no more than a guess as to what Congress intended." *Ladner* v. *United States*, 358 U.S. 169, 178 (1958).

One of the principles "from which aid can be derived" in the interpretation of statutes is the principle that deference is to be given to reasonable interpretations of tax and customs legislation by the Treasury—the agency that Congress has charged with enforcement of these complex provisions. See *Zenith Radio*, 437 U.S. at 450. See U.S. Br. 31. The rule of lenity does not alter that established principle.

5. Finally, respondent says that there is simply no need for interpretive regulations because "the President, on the recommendation of the [International Trade Commission], is authorized to modify" a classification term if necessary (Resp. Br. 37). It is, of course, equally true that Congress has power to amend the statute. Until a specific fact pattern has caused frequent litigation, however, the need for such modification or amendment would not be manifest. Interpretive authority is vested in the Treasury so that unnecessary litigation of the "limitless factual variations" that arise under tax legislation may be avoided through authoritative advance guidance from the agency that is "responsible for putting the rules into effect." *National Muffler Dealers Ass'n*, 440 U.S. 477. That sound public purpose could not be achieved if the Treasury were deprived of the power Congress granted it to issue "such rules and regulations" as are

needed to ensure the proper "classification and assessment of duties" (19 U.S.C. 1502(a)).

II. *The challenged regulation should be sustained as a reasonable interpretation of the statute.*

1. Respondent contends that, "[b]ecause each article has its own assembly process" (Resp. Br. 39), the statutory duty exception for "operations incidental to the assembly process" requires a case-by-case analysis that is incompatible with any categorical, interpretive rules. That contention, however, fails to consider that, immediately following the phrase "incidental to the assembly process," the statute itself provides *categorical* examples "*such as* cleaning, lubricating and painting" (HTSUS Subheading 9802.00.80 (emphasis added)).[13] By providing such examples, the statute plainly contemplates that a categorical identification of operations "incidental" to assembly is appropriate. It is therefore implausible for respondent to contend that the statute requires the agency and importers to litigate the specific facts of every case to determine whether recurring types of operations are, or are not, "incidental" to assembly.[14]

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[13] Respondent's argument thus violates "the canon of construction that 'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *United States* v. *R.L.C.*, 503 U.S. 291, 314 (1992), quoting from *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989).

[14] The fact that "categorical" rules may be adopted does not, of course, resolve whether a particular operation comes within a particular rule. See, *e.g.*, *General Motors Corp.* v. *United States*, 976 F.2d 716, 718 (Fed. Cir. 1992) (extensive automotive "finish painting" held not to constitute the type of "painting" "of such a minor nature as to be considered incidental to the main assembly process"); *Chrysler Corp.* v. *United States*, 86 F.3d 1173 (Fed. Cir.), cert. denied, 519 U.S. 823 (1996) (same). For example, as respondent notes (Resp. Br. 45), an operation that involves pressing alone, as an incident of assembly, would not, for that reason alone, be "permapressing" within the scope of the regulation. The present case, however, unlike the private letter ruling to which respondent refers

2. Respondent errs in asserting (Resp. Br. 41) that the regulation is too broad because it excludes from the term "operations incidental to the assembly process" *all* operations that have a "primary purpose" other than assembly. That contention ignores the language and rationale of both the statute and the regulation. The regulation interprets the statutory phrase "incidental to the assembly process" to exclude "[a]ny *significant* process, operation, or treatment other than assembly whose *primary purpose* is the fabrication, completion, physical or chemical improvement of a component" (19 C.F.R. 10.16(c) (emphases added)). By concluding that "significant" processes performed for the primary purpose of "fabrication, completion, physical or chemical improvement" are not merely "incidental" to assembly, the regulation articulates the same understanding of the statute reflected in its legislative history. As the House Report explains in describing why operations such as "cleaning, lubricating and painting" may be "incidental to assembly" (H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965) (emphasis added)):

> [I]n fitting the parts of a machine together, *it may be necessary* to remove rust; to remove grease, paint, or other preservative coatings; to file off or otherwise remove small amounts of excess material; to add lubricants; or to paint or apply other preservative coatings. * * * Such operations, *if of a minor nature* incidental to the assembly process, whether done before, during, or after assembly, would be permitted even though they result in

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(Resp. Br. 45), involves far more than pressing alone. Indeed, as the courts below acknowledged, the ovenbaking procedure that respondent performs in the "chemical improvement" of articles through permapressing constitutes a "significant" operation that, unlike pressing alone, is "*not* necessary, nor related to assembly" (Pet. App. 19a (emphasis added)). These basic findings have not been disputed by respondent in this Court.

an advance in value of the U.S. components in the article assembled abroad.

As the facts of this case demonstrate, the agency reasonably concluded, by contrast, that permapressing operations performed abroad are *not* "of a minor nature" and are *not* "necessary" to the assembly process. See note 14, *supra*. Because the regulation thus conforms precisely to the text and history of the statute, the agency's interpretation is "'sufficiently reasonable' to be accepted by a reviewing court." *Zenith Radio*, 437 U.S. at 450. Even if respondent could articulate some different criteria for identifying operations that are incidental to the assembly process, that would not be a sufficient basis for rejecting the "reasonable" interpretation adopted by the agency. See, *e.g.*, *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 389 (1984).[15]

3. Finally, respondent contends (Resp. Br. 49-50) that this case should be remanded to permit a new attack on the validity of the regulations based upon the comments submitted in connection with the rulemaking procedure in 1974. This tardy request should be rejected by this Court.[16] The

[15] In this case, moreover, respondent does not even suggest that any alternative criteria for interpretation of the statute are preferable. Instead, respondent asserts (Resp. Br. 28) that the statute simply permits no interpretive guidance at all.

[16] Before this Court granted certiorari on September 29, 1998, respondent contended only that the regulation was facially inconsistent with the Tariff Act. On November 16, 1998, respondent, for the first time, made an informal request to the agency for the 1974 rulemaking comments. Two days later, respondent followed that with a formal Freedom of Information Act request that was submitted through an anonymous agent. Counsel for the government were first made aware of respondent's request when respondent's brief was filed in this Court on December 8, 1998. By then, a letter dated December 7, 1998, had been sent by the agency to advise respondent that the rulemaking comments had been located. Copies were supplied to respondent, and at least some of them

general rule that "an appellee may rely upon any matter appearing in the record in support of the judgment below" (*Blum* v. *Bacon*, 457 U.S. at 137 n.5) does not permit respondent to raise *new* arguments that "respondent failed to raise * * * below" (*Granfinanciera, S.A.* v. *Nordberd*, 492 U.S. 33, 38 (1989)). See note 16, *supra*.

Moreover, the materials in the rulemaking record support the reasonableness of the agency's judgment. Most of the comments favored the adoption of the proposed regulations to provide greater guidance and predictability on the issues addressed.[17] The numerous comments were carefully considered by the agency and were reflected in several changes from the proposed rule. See 40 Fed. Reg. 43,021 (1975). Respondent's belated effort to propel this litigation into the next millennium by the untimely assertion of its numerous new contentions should not be accepted by this Court.

* * * * *

have been lodged with the Court. See Part I of the Second Lodging of Respondent (December 16, 1998). Because these materials have been available to respondent since 1974, the "supplemental" brief filed by respondent on December 16, 1998, violates Rule 25.5 of the Rules of this Court.

[17] See, *e.g.*, comments contained in Part I of the Second Lodging of Respondent (December 16, 1998), by C.J. Tower & Sons, Customhouse Brokers, dated August 29, 1974 ("The public will be well served by clearly written regulations such as were found in this proposed amendment. We compliment those who wrote it."); Mattel, Inc., dated August 30, 1974 ("It is conceded that there has been a definite need for guidelines regarding the use of 807.00 T.S.U.S. since September, 1963. We in the importing field appreciate the effort * * * to establish firm guidelines regarding these complex provisions."); the Foreign Trade Association of Southern California, dated August 30, 1974, at 1 ("our Association has always supported all efforts by the Customs Service to clarify the requirements for importations * * * . The Customs Service has done exemplary work in connection with Item 807.00."); the American Importers Association (August 29, 1974).

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 1998

(8)

Supreme Court, U.S.
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DEC 16 1998
CLERK

No. 97-2044

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

UNITED STATES OF AMERICA,
Petitioner,

v.

HAGGAR APPAREL COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPPLEMENTAL BRIEF OF RESPONDENT

Pursuant to Rule 25.5 of the Rules of this Court, respondent respectfully submits this supplemental brief to present respondent's views on public documents -- namely, certain comments filed in response to the Customs Service's Notice of Proposed Rulemaking issued in 1974 that was the basis for the regulations in this case -- that were "not available in time to be included" in respondent's brief. See Sup. Ct. R. 25.5.

PROCEDURAL BACKGROUND

The regulations at issue in this case were set forth for public notice and comment in a Notice of Proposed Rulemaking issued on July 5, 1974. See 39 Fed. Reg. 24561 ("the NPRM"). Respondent first requested a copy of the comments filed in response to the NPRM from the agency on November 16, 1998, and filed a Freedom of Information Act Request for them on November 18, 1998. See Lodging of Respondent at Tabs A & B (lodging filed December 10, 1998). Respondent was initially informed that the comments had been lost or destroyed. *Id.* at Tab B. Respondent's brief, filed on December 8, 1998, reflected that understanding. Respondent's Br. at 49-50 & n.12.

On December 9th, 1998, one day after the filing of Respondent's brief, Respondent received notice that Customs had located the comments on the NPRM. Lodging of Respondent at Tabs C & D. Respondent brought this fact to the Court's attention in the Lodging of Respondent and accompanying cover letter, dated December 10, 1998, which lodged 10 documents (Tabs A through J).

Respondent promptly ordered a copy of the comments, and received that copy on the afternoon of December 11, 1998. Second Lodging of Respondent, at Tab K. The letter from

Customs transmitting the comments stated that Customs had located and was providing "all the comments received" by Customs in response to the NPRM. *Id.* Accordingly, together with the filing of this supplemental brief, respondent is lodging with the Clerk three copies of the full set of the comments as transmitted by Customs to Respondent on December 11, 1998.

In addition, Respondent is also lodging 20 copies of those particular comments, and excerpts of comments, that Respondent believes are particularly relevant to several of the issues in this case, as well as the letter from Customs transmitting the comments to the document retrieval service. Second Lodging of Respondent (Tabs K through T). The transmittal letter appears at Tab K, and the selected comments, referred to below, appear at Tabs L through T.

ARGUMENT

The comments that Customs received on the NPRM concerning the regulations at issue in this case are directly relevant in at least three respects, discussed below, to the arguments that Respondent raised in its brief. Most importantly, however, the comments confirm that Customs issued its regulations interpreting the TSUS solely for public information and to guide customs officers, not to bind the courts.

1. The lodged documents strongly support the points, made at pages 28-33 and 35-36 of respondent's brief, that Customs lacks authority to issue substantive regulations interpreting the Tariff Schedule of the United States (TSUS), that Customs understood that it lacked such authority when it issued the final rule, and that Customs therefore revised its regulations to make clear that it was not purporting to exercise such authority.

To begin with, several of the commenters expressly pointed to the lack of any statutory authority for Customs to issue substantive interpretations of the TSUS. Three of the commenters expressly observed that Customs lacked authority, under Headnote 11, to promulgate any regulations other than procedural rules "addressed to obtaining *facts* that are not determinable from an examination of an article in its condition as imported." Baker & McKenzie Comments at p. 3 (attached at Tab M); see Submission of American Importers Association at p. 1 (Tab O) ("By its very language such headnote [11] authorizes the Secretary of the Treasury to promulgate regulations only insofar as they require the submission of facts which are a prerequisite to a claim under item 807.00, and which are not determinable from an examination of the imported merchandise."); Stewart & Ikenson Comments at pp. 24-25 (Tab L). Compare with Resp. Br. 31-33 (similarly arguing that Headnote 11, on its face, provides authority only for procedural rules, and adding further support from legislative history).

Beyond Headnote 11, one commenter went on to survey the other sources of statutory authority cited in the NPRM. See Baker & McKenzie Comments at pp. 2-4 (attached at Tab M). These comments concluded that none of the provisions, including 19 U.S.C. § 66, 19 U.S.C. § 1502, 19 U.S.C. § 1624, or Headnote 11, gave the Secretary the authority to issue substantive interpretations of the TSUS. Compare with Resp. Br. 28-31 & n.7 (similarly reviewing each cited source of statutory authority and concluding that none authorizes substantive rulemaking).

Many other commenters, without providing a comparably detailed analysis of statutory authority, asserted that the Customs Service lacked authority to issue interpretive rules because that function was reserved to Congress and, significantly, because such rulemaking would unduly infringe on

the role of the judiciary in interpreting item 807.00. See Comments of Foreign Trade Ass'n of Southern California at 1 (Tab N) (the proposed interpretive rules constitute improper "legislation by the Customs Service" and also "impinge directly upon the function of the judiciary in interpreting . . . Item 807.00"); Comments of Louis Schneider at 1 (Tab P) (definitions and interpretive regulations "go beyond the authority delegated to the Secretary"); Comments of Los Angeles Area Chamber of Commerce at 1-2 (Tab Q) ("we are firmly convinced that in large measure, the proposed Regulations exceed the Secretary's authority" and "improperly infringe on the functions of the Congress and of the Judiciary and seriously limit and amend the statutory provisions"); Comments of Mattel, Inc. at 4 (Tab R) ("the proposed rules go beyond the administrative function of Headquarters and encompass areas of definition which should be decided by Congress or the courts"); Comments of S. Richard Shostack at 1 (Tab S) (interpretive rules, "as contrasted to the Procedural regulations," are "not the proper subject of regulations").

In light of this problem, the commenters argued for one of two results. Many claimed that Customs should simply delete the interpretive regulations from the final rule, and publish, at most, a revised set of interpretations separately as guidelines or in a pamphlet. See, *e.g.*, Submission of American Importers Ass'n at 1 (Tab O) ("interpretations as to substance do not belong as regulations"); Comments of Foreign Trade Ass'n of Southern California at 2 (Tab N) (agency's "purposes can be achieved by the issuance of further guidelines" and by further "interpretative rulings" rather than by regulations); Comments of Mattel, Inc. at 4 (Tab R) (Customs' "rulings and guidelines should remain as such and not be included as part of the Customs Regulations").

Others suggested that, if the Secretary were to go forward with the interpretive regulations, "it would be appropriate to *segregate* those *procedural* regulations which were intended to govern the admission of articles under Item 807.00, *i.e.* proposed Section 10.17, from those *informative, advisory,* and *interpretative* rulings which serve the function of notifying the public of Customs' constructions of the law, *i.e.*, all of the other proposed regulations relating to item 807.00." Stewart & Ikenson Comments at p. 25 (Tab L) (first emphasis added); see also Baker & McKenzie Comments at p. 8 (Tab M) ("we recommend that those provisions that deal with procedures be specifically grouped under a major subheading entitled 'Procedures.' . . . . If any interpretive material is issued, such interpretive material should be characterized as interpretive").

In fact, these same two commenters further suggested that, if Customs were to go forward with both procedural rules and interpretive rules, segregated as they recommended, that Customs also replace the general introductory regulation, "proposed Section 10.11," with a new introduction that clearly introduced the "interpretive rule[s]" separately from the procedural rules, and that made clear that the interpretive rules were being "promulgated so that the public may be informed as to the constructions and interpretations the Customs Service has given to relevant statutory terms." Stewart & Ikenson Comments at p. 25 (Tab L); see Baker & McKenzie Comments at pp. 7-8 (Tab M) (recommending revisions to section 10.11 to distinguish "procedures" and "requirements" from "any interpretive material" that may be issued).

Given these comments, the agency's response is particularly telling. The Customs Service made absolutely no effort in any way to dispute the showing made by the commenters that it lacked statutory authority to issue binding

interpretations of the TSUS. To the contrary, Customs expressly *acquiesced* in the commenters' analysis of its lack of statutory authority to issue such binding rules. It did so by acknowledging that, "[a]fter consideration of the numerous comments received, the following changes have been made," and by then adopting one of the solutions proposed by the commenters to remedy this very problem. 40 Fed. Reg. 43021.

Specifically, in the agency's words, the agency explained that "Section 10.11 was rewritten to *explain the difference* between interpretative and procedural regulations. Further, the numbering of the sections was changed and the sections were so organized that *their sequence reflects the difference between interpretative and procedural matters.*" 40 Fed. Reg. 43021 (emphasis added). The agency then followed the commenters' recommendation of replacing proposed section 10.11 with a new section 10.11 that had two subparts, (a) and (b), which separately introduced the interpretive rules and the procedural rules. *Id.* Finally, in subpart (a), which introduced the definitions in 10.12 and the interpretive rules in sections 10.13 through 10.23, the agency stated, in language that closely parallels language that one of the commenters proposed for this very purpose, that the interpretive rules were being provided merely to "inform the public" of the constructions of the TSUS that customs officers would give "at the ports of entry." Compare 19 C.F.R. § 10.11 with Stewart & Ikenson Comments at p. 25 (Tab L). And consistent with the many comments that accused the agency of improperly intruding on the judicial role in interpreting item 807.00, the agency added the further disclaimer that "[n]othing" in the interpretive rules was "intended to restrict the legal right of importers or others to a judicial review of the matters contained therein." 19 C.F.R. § 10.11(a). By contrast, in subsection (b), Customs referred to section 10.24 as setting forth the "documentary requirements" applicable to item 807.00, and specified that "[a]llowance of an

importer's claim" was dependent upon compliance with those documentary and other statutory "requirements." 19 C.F.R. § 10.11(b).

Having failed to defend that it had substantive rulemaking authority, and having revised its rules to make clear that it was not exercising such authority, Customs may not fairly claim now, almost 25 years later, that its interpretive rules provide a basis for altering the standard of review in de novo judicial proceedings and for restricting the rights of importers. In short, the agency's response to the comments conclusively forecloses the agency's belated claim for *Chevron* deference.

2. The foregoing point is dispositive. But the comments also directly support a separate argument against deference, made at pages 40-43 of Respondent's brief. As in the brief, the comments point out that the two criteria that the agency used to classify certain operations as not "incidental to the assembly process" are improper. 19 U.S.C. § 1202, Item 807.00; see Comments submitted by Arnold & Porter at pages 6-7 (Tab T). For example, the comments state that "[t]here is no basis in Item 807 for making the purpose of the operation determinative" of whether it is incidental, and further note that "[t]he great preponderance of operations held to have been incidental to assembly have involved completion, modification or physical or chemical improvement of a component." *Id.* at 6. The comments also argue that it is inappropriate for the regulations to exclude an operation from a duty allowance merely because it "'is not related to the assembly process.'" *Id.* at 6-7. The argument expressed in these comments is a valid reason for rejecting the regulations as inconsistent with the statute. See Respondent's Br. 40-43. At the very least, the agency's failure to respond to these comments and to justify its use of these criteria at the time it promulgated its regulations precludes any conclusion at this time that the regulations are

reasonable. See *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977) ("the opportunity to comment is meaningless unless the agency responds to significant points raised by the public") (footnote omitted); *Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 48-50 (1983).

3. The comments pertain to at least one other point. Respondent noted in its brief that although its FOIA request for the comments was "pending," respondent had been informed that the comments had been "lost"; consequently, respondent argued that the "absence of an administrative record alone defeats the Solicitor General's claim for deference." Respondent's Br. 49 & n.12. The letter transmitting the comments indicates that Customs has now provided "all the comments received" in response to the NPRM. See Second Lodging of Respondent at Tab K. Accordingly, respondent now withdraws that portion of its argument that relies on the absence of a complete record as a basis for not giving deference to these regulations. Nevertheless, a complete assessment of the effect of the recovery of these comments on the reasonableness inquiry would be best undertaken, if necessary at all, on remand.

CONCLUSION

For the foregoing reasons and those stated in the Brief of Respondent, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA,

Petitioner,

vs.

HAGGAR APPAREL COMPANY,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICI CURIAE* ANHYDRIDES & CHEMICALS, INC., IKO INDUSTRIES, LTD. AND MARUBENI AMERICA CORPORATION IN SUPPORT OF RESPONDENT

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APPENDIX

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CONSENT OF PARTIES

Petitioner and respondent have consented to the filing of this brief, *amici curiae*.[1]

INTEREST OF *AMICI*

Amici, Anhydrides & Chemicals, Inc. (Anhydrides), IKO Industries, Ltd. (IKO), and Marubeni America Corporation (MAC), have all been parties in recent litigation before the Court of Appeals for the Federal Circuit (hereinafter "CAFC") in which the government has claimed that deference under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) is owed to determinations by Customs.[2] In those cases, *amici*, all importers who prevailed on appeal (one affirmance; two reversals) addressed in their briefs a large body of law specific to such determinations by Customs, based in precedents of this Court and the courts which have had jurisdiction over customs issues for more than 150 years. Amici's cases were among seven appeals pending before the CAFC at the same time, in each of which Customs argued for some new standard of deference to be applied to determinations by Customs officials.[3] *Amici* responded with citation to precedents of this Court precluding such a new standard of deference. The government's brief here does not address those precedents, nor does it advance any grounds for overruling them, notwithstanding the fact that several were specifically cited in the CAFC's opinion in *Anhydrides, supra*, at 1485, and cited by Haggar in its Brief in Opposition to the Petition for Certiorari, at 25, n. 10.

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1. Their consents have been filed with the clerk of this Court. This brief was authored by the *amici* and counsel listed on the front cover hereof, and was not authored in whole or in part by counsel for a party. No one other than the *amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

2. *See Anhydrides & Chems., Inc. v. United States*, 130 F.3d 1481 (Fed. Cir. 1997); *IKO Industries, Ltd. v. United States*, 105 F.3d 624 (Fed. Cir. 1997) and *Marubeni America Corporation v. United States*, 114 F.3d 202 (Fed. Cir. 1997). The first two are among those decisions cited by the government here as wrongly decided.

3. *See* letter of the Department of Justice to the Clerk of the CAFC, at Appendix A, 1a-3a.

INTRODUCTION

The issue raised by this case is whether the courts should review the instant determination by Customs independently, deciding the question of law *de novo*, or whether they should defer to the agency's interpretation of the law. On this most basic issue, *amici* agree with the respondent, Haggar Apparel Company, that the issue has long been settled judicially, and was further emphasized and codified by the Congress in 1980.

As this Court observed in 1850:

> The orders as well as the opinions of the head of the Treasury Department, expressed in either letters or circulars, are entitled to much respect, and will always be duly weighed by this court; but it is the laws which are to govern, rather than their opinion of them, and importers, in cases of doubt, are entitled to have their rights settled by the judicial exposition of those laws, rather than by the views of the Department. (*Marriott v. Brune*, 9 Howard, 634, 635.) And though, as between the custom-house officers and the Department, the latter must by law control the course of proceeding (5 Stat. At Large, 566), yet, as between them and the importer, it is well settled, that the legality of all their doings may be revised in the judicial tribunals. (*Tracy et al. v. Swartwout*, 10 Peters, 95; *United States v. Lyman*, 1 Mason, C.C. 504; Opinions of Attorney-General, 1015.)

Greely v. Thompson, 51 U.S. 225, 234 (1850). This independent judicial approach has been consistently followed, and in 1980, at the urging of the Department of Justice among others, was codified in 28 U.S.C. § 2640 for customs classification and valuation issues such as presented here, at the same time a more deferential standard was provided for other issues in other areas of trade law.

> Mr. COHEN. Senator, I think the prime reason was because the cases within the court's present jurisdiction are reviewed by means of trial *de novo* rather than on the basis of the administrative record.

> It was not our intention to change that principle at all. Under those circumstances, given the fact that trial *de novo* is the most sweeping form of judicial review available, we felt that it was appropriate to continue to maintain the types of prerequisites to jurisdiction which now exist with respect to the court's present jurisdiction.

Hearings before the Subcommittee On Improvements In Judicial Machinery of the Committee On the Judiciary, S. 2857, June 23 and 27, 1978. Statement of David M. Cohen, Director, Commercial Litigation Division, Department of Justice.

The purpose of *amici*'s filing is to emphasize a principle of law, which has received little attention to date in this matter, which was developed by this Court and other courts in the exercise of their independent function. That principle, that doubts remaining after the court's analysis of a customs revenue provision should be resolved in favor of the importer, is the antithesis of the deference the government seeks here.

Determinations by Customs are distinguished from those of other agencies, and the cases such as *Chevron* and *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), which the government cites, are simply inapposite here, because none of them involve customs duties. The Solicitor General's claim in the Petition for a Writ of Certiorari, at p. 10, that the decision below represents a "clear departure . . . from the standards of deference required by the decisions of this Court," misrepresents the law and the facts. The decisions which are cited never applied to customs revenue laws. There has been no departure, because, historically, there has been no standard of deference in such matters, and the decision below is consistent with those decisions of this Court which apply to customs revenue laws.

A reversal by this Court would undermine *amici*'s cases, and more than 150 years of tariff law on *de novo* review of legal issues, and resolution of doubts in favor of the importer in classification issues such as this, without the necessary showing that these precedents are "unworkable or are badly reasoned" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), and *amici* therefore urge affirmance of the decision under review based on the precedents of this Court related to customs duties, which should be controlling here.

SUMMARY OF ARGUMENT

Definite principles of law have been laid down by this Court which apply to customs, but do not apply to other kinds of legislation. One of these, reflected in this Court's holding in *Hartranft v. Wiegmann*, 121 U.S. 609, 616 (1887)[4], that doubts in the interpretation of a customs revenue statute[5] should be resolved in favor of the importer, makes this Court's holding in *Chevron* and similar cases inapplicable here. No decision of this Court, or legislative action, has abrogated that principle. If, as the government alleges, the relevant language, "operations incidental to the assembly process," in the tariff classification provision in issue, subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, is "not plain and unambiguous" (Petition, *supra*, at 16), it would have to be ambiguous. The Court, in that case, need not deal with the provision itself, but should resolve that ambiguity in favor of the importer, affirming under its own precedents.

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4. As *Hartranft* is the first decision in which this Court applied the principle of liberal interpretation in favor of the importer for customs revenue laws, we will refer to this as the "*Hartranft* principle." That principle is one of statutory construction, indexed under "Construction: Doubt resolved in favor of importer" in the reports of the CAFC's predecessor (Index, 11 Ct. Cust. Appls. at 573 (1923)), and under "RULES OF CONSTRUCTION, § 51.8 *Liberal and strict construction*" in Sturm, Ruth F., Customs Law & Administration, Third Edition, Oceana Publications, New York (1996). The cases cited there treat it as such. It is not a presumption or standard of review; nor does it relate to the burden of proof; nor was it affected by the decision in *Jarvis Clark Co. v. United States*, 733 F.2d 873, 877 (Fed. Cir. 1984):

> The government argues that § 2643(b) is only a grant of general equity powers and was not intended to have any effect on the burden of proof faced by the importer.

5. We will use the term "customs revenue laws" to describe those customs duty provisions covering the classification or valuation of imported goods, as distinguished from customs procedural provisions, or those other tariff or trade statutes, such as antidumping or countervailing duty, which are better described as "international trade" law.

ARGUMENT

I. DEFINITE PRINCIPLES OF LAW HAVE BEEN LAID DOWN BY THIS COURT WHICH DO NOT APPLY TO OTHER KINDS OF LEGISLATION. ONE OF THESE MAKES THIS COURT'S HOLDING IN *CHEVRON* AND SIMILAR CASES INAPPLICABLE HERE.

A. Differences between customs and other areas of law.

The government argues that Customs' "determination" here, its regulatory limitation of the provisions of subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202, is owed deference under this Court's decision in *Chevron*. In so doing, it ignores the few, but important, distinctions between the principles of law applicable to the Customs Service and to other administrative agencies.

> Tariff laws, while subject to the same rules of construction and legal principles as other legislative acts, yet have during a century and a half of application acquired certain characteristics not found in other legislation, and certain definite principles of law have been laid down by the courts in construing tariff laws, which of necessity do not apply to other kinds of legislation. *Stone & Downer Co., et al. v. United States*, 12 Ct. Cust. Appls. 62, 70, T.D. 40019 (1923).

Sturm, *supra*, § 51.1. This Court in a parallel case, *Stone & Downer Co., et al. v. United States*, 274 U.S. 225 (1927), firmly established the principle that *res judicata* is not applicable in customs classification cases. The reasons are clearly stated at pp. 231-37 of this Court's opinion, wherein customs duty cases are distinguished from other cases.

For purposes of the present case, however, the most important distinction between the laws applicable to tariffs and that applicable to other kinds of legislation is with regard to the principle next discussed.

B. In a case of ambiguity in a term in a customs revenue law, that ambiguity must be resolved in the importer's favor.

Where there are two reasonable interpretations of a tariff term in a customs revenue law, and a doubt remains as to the meaning Congress intended, the court should adopt that interpretation which favors the importer. The number of cases decided under this principle, and the period of time over which they were decided, establish without question that the principle is "workable."

The *Hartranft* principle was already established in this country by 1838 (*see* the opinion of Circuit Justice Story in *Adams v. Bancroft*, 3 Sumner, 384 (C.C.D. Mass, 1838)):

> . . . duties are never imposed upon citizens upon doubtful interpretations; for every duty imposes a burthen on the public at large, and is considered strictly, and must be made out in a clear and determinate manner from the language of the statute.

This principle was followed by the Court in its holdings in *United States v. Edwin B. Isham*, 84 U.S. (17 Wall.) 496, 504 (1873), citing cases on both sides of the Atlantic:

> 4. If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C.B., in *Gurr v. Scudds*, 11 Exch., 191, "a tax cannot be imposed without clear and express words for that purpose." *Conroy v. Warren*, 3 Johns. Cas., 259,

and in *Hartranft v. Wiegmann*, *supra*, at 616, which does the same:

> We are of the opinion that the decision of the Circuit Court was correct. But if the question were one of doubt, the doubt would be resolved in favor of the importer, "as duties are never imposed on the citizen upon vague or doubtful interpretations." *Powers v. Barney*, 5 Blatchford, 202; *United States v. Isham*, 17 Wall. 496, 504; *Gurr v. Scudds*, 11 Exch. 190, 191; *Adams v. Bancroft*, 3 Sumner, 384.

Similar language appears four years later in this Court's opinion in *American Net & Twine Co. v. Worthington*, 141 U.S. 468, 474 (1891):

> We think the intention of congress that these goods should be classified as "gilling twine" is plain; but, were the question one of doubt, we should still feel obliged to resolve that doubt in favor of the importer, since the intention of congress to impose a higher duty should be expressed in clear and unambiguous language. *U.S. v. Isham*, 17 Wall. 496; *Hartranft v. Wiegmann*, 121 U.S. 609, 7 Sup. Ct. Rep. 1240; *Gurr v. Scudds*, 11 Exch. 190.

In those three decisions of this Court, and in *Eidman v. Martinez*, 184 U.S. 578, 583 (1902); *Swan & Finch Co. v. United States*, 190 U.S. 143 (1903) and *Benziger v. United States*, 192 U.S. 38 (1904), this Court has, in its own words, "repeatedly" (184 U.S., 583) applied this principle. It was so clearly accepted as to have become, by the time of the decision in *Rice v. United States*, 53 Fed. 910, 912 (CCA, Eighth Circuit, 1893) (cited with approval in *Benziger*, *supra*, at p. 54) "the uniform doctrine of the authorities." Twenty years later, in such decisions as *American Express Co. v. United States*, 3 Ct. Cust. Appls. 475, 479, T.D. 33121 (1913), *Newhall v. United States*, 4 Ct. Cust. Appls. 134, 137, T.D. 33410 (1913), and in later cases, including *United States v. Ducommun Hardware Corp., et al.*, 7 Ct. Cust. Appls. 353, T.D. 36904 (1924) and *VonBremen, Asche & Co. v. United States*, 12 Ct. Cust. Appls. 407, T.D. 40585 (1924), this principle had become a "settled rule," or "settled law," needing no citation.

The principle is clearly stated in *Swan & Finch*, *supra*, at 146:

> Where the burden is placed upon a citizen, if there be a doubt as to the extent of the burden it is resolved in favor of the citizen, but where a privilege is granted any doubt is resolved in favor of the government. In *Hartranft v. Wiegmann*, 121 U.S. 609, 616, the one rule was thus stated:
>
> > We are of opinion that the decision of the Circuit Court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, "as duties are never imposed on the citizen upon vague or doubtful

> interpretations." *Powers v. Barney*, 5 Blatch. 202; *United States v. Isham*, 17 Wall. 496, 504; *Gurr v. Scudds*, 11 Exch. 190, 191; *Adams v. Bancroft*, 3 Sumner, 384. See also *American Net & Twine Co. v. Worthington*, 141 U.S. 468, 474.

The most recent decision of this Court[6] which applies this principle in interpreting a customs revenue law [there a classification provision] is *Benziger*, *supra*, which holds:

> This provision of the statute should be liberally construed in favor of the importer, and if there were any fair doubt as to the true construction of the provision in question, the courts should resolve the doubts in his favor. *American Net & Twine Co. v. Worthington*, 141 U.S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; *United States v. Wigglesworth*, 2 Story, 369, Fed. Cas. No. 16,690; *Rice v. United States*, 4 C.C.A. 104, 10 U.S. App. 670, 53 Fed. 910.

192 U.S. at p. 54.

From *Isham* to *Benziger*, there were revisions of the tariff in 1883, 1890, 1894, and 1897. *See* "Tariff Acts Passed by the Congress of the United States from 1789 to 1909," House of Representatives Document No. 671, 61st Congress, 2d Session (1909). Had Congress, presumptively being aware of this Court's holdings, The *Brechteen Co. v. United States*, 854 F.2d 1301 (Fed. Cir. 1988) wished to change this principle, it could have done so.

The predecessors to the Court of International Trade (hereinafter "CIT") and CAFC, and other Federal courts, uniformly followed this principle. In *Rice v. United States, supra*, cited with approval in *Benziger*, the Court stated:

> . . . In a case of doubtful construction "and" would probably be used disjunctively, to prevent the imposition of pains and penalties, but it would not be so used for the

6. Under the Tariff Act of August 5, 1909, 36 Stat. 11, 105, § 29, the decisions of the Court of Customs Appeals from 1909-14 were not reviewable under any circumstance, and thus the nearly dozen decisions of that court cited herein are binding decisions of a court of last resort.

> purpose of imposing them; and so, in a doubtful case, it will not be used disjunctively for the purpose of imposing a tax or charge upon the citizen.

The rule for construction of statutes levying taxes or duties on the citizen is laid down by Lord Cairns, in delivering the judgment of the house of lords, (Partington v. Attorney General, L.R. 4 H.L. 100, 122) in this language:

> As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an "equitable construction," certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

Judge Story says:

> It is a general rule, in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specially pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly

> and clearly import. Revenue statutes are in no just sense either remedial laws, or laws founded upon any permanent public policy, and therefore are not to be liberally construed.
>
> *U.S. v. Wigglesworth*, 2 Story, 369. And this is the uniform doctrine of the authorities. *Net & Twine Co. v. Worthington*, 141 U.S. 474, 12 Sup. Ct. Rep. 55; *U. S. v. Isham*, 17 Wall. 496; *Hartranft v. Wiegmann*, 121 U.S. 609, 7 Sup. Ct. Rep. 1240; *Powers v. Barney*, 5 Blatchf. 202; *Dean v. Charlton*, 27 Wis. 526; Suth. St. Const. 461, 462; Cooley, Tax'n, (2d Ed.) 266; Dwar. St. p. 749. 53 Fed. at 912.

Very simply, the court in *Rice* held that where the word "and" had two possible meanings, one conjunctive and one disjunctive, it would (and did) interpret the term conjunctively if to do so resulted in the lesser duty. However, it was also prepared to apply the less common "sometimes" used disjunctive meaning if that would result in the lesser duty.

The court's willingness to apply whichever of two or more possible meanings of a term results in the lowest duty, is illustrated by the court's application of a broad meaning to the term "waste" in *Central Vermont Railway Co. v. United States*, 10 Ct. Cust. Appls. 31, 36, T.D. 38260 (1920), while it applied a narrow meaning to the term "waste" in a different provision of the tariff in *United States v. Hatters' Fur Exchange*, 1 Ct. Cust. Appls. 198, 202, T.D. 31237 (1911). (In both cases giving the importer the benefit of such differing interpretations).

In one of the first decisions by the newly created Court of Customs Appeals, *United States v. Sussfeld*, 1 Ct. Cust. Appls. 51, 52 (1910), the government, which here bases its argument on an assumption that the law applicable to customs and other areas must be the same, instead argued that the law applicable to copyright and customs was different.

> It is urged in the brief of counsel for the Government that the Federal cases cited are not in point, for the reasons, as stated, that extreme liberality marks the interpretation of the copyright laws, and that decisions under that statute are unsafe precedents to follow in construing the tariff law. We need not determine whether counsel for the

> Government is correct in asserting that the courts are uniformly liberal in construing the copyright laws. If he is correct in this, it is equally true that the courts are liberal in favor of the importer in construing revenue statutes. See *Hartranft v. Wiegmann* (121 U.S., 609); *Swan & Finch Co. v. United States* (190 U.S., 143); and *Eidman v. Martinez* (184 U.S., 583).

In a long line of other decisions of the Court of Customs Appeals after *Sussfeld* on this issue, this principle of liberal construction in favor of the importer was restated and followed. These include *Woolworth v. United States*, 1 Ct. Cust. Appls. 120, 122, (1910) and *United States v. Wells Fargo & Co.*, 1 Ct. Cust. Appls. 158, 162 (1911). *See also Hatters' Fur Exchange, supra*; *United States v. Matagrin*, 1 Ct. Cust. Appls. 309, 312 (1911); and *United States v. Michelin Tire Co.*, 1 Ct. Cust. Appls. 518 (1911). The opinion in *Michelin* illustrates how the courts apply this principle, in the following from pp. 526-27:

> In any view it seems self-evident that the india-rubber *product*, whatever it may be termed in trade, of processes applied to old scrap or refuse india rubber, might well be included in the descriptive term "old scrap or refuse india rubber," deriving its description from its source of immediate production. In fact, we do not see how that conclusion can be seriously denied, and that being true, or even if only doubtful, the importer, appellant, is entitled to judgment upon the doctrine of doubt. It must be confessed that the character of the merchandise imported when considered in conjunction with the various provisions of law invoked is not entirely free from doubt. It might be better said that the proper interpretation of the language in paragraph 579 and its intended scope is not entirely free from doubt. The changed phraseology of the corresponding paragraph in the tariff act of August 5, 1909, indicates at least a question in the mind of Congress as to the proper construction and import of the provision of the tariff act of 1897.
>
> In the presence of doubt the importer is entitled to have the doubt resolved in his favor.

In *United States v. Harper*, 2 Ct. Cust. Appls. 101, 105, T.D. 31655 (1911) the Court stated:

> We recognize that the question involved in this case cannot be said to be entirely free from doubt, but resolve whatever doubt exists in favor of the importers. That we should do so is settled law. *American Net & Twine Co. v. Worthington* (141 U.S., 468).

The courts continued to uniformly apply this principle at the trial level, and in a number of appellate decisions.[7]

In a later case, *United States v. Kurt Orban*, 47 CCPA 28, 31, C.A.D. 724 (1959), the court stated: "[W]e think it proper to resolve that doubt [as to the construction to be given a word in the statute] in favor of the importer." [Citations omitted and Explanation added].

More recent appellate cases where this principle is cited in deferring to the importer are *United States v. Greek Orthodox Church of Evangelismos*, 49 CCPA 35, 39, C.A.D. 792 (1962), which recognized: ". . . the rule of liberal construction in favor of the importer stated by the Supreme Court in *Benziger v. United States*, 192 U.S. 38"; *Gorton's of Gloucester, Inc. v. United States*, 52 CCPA 86 (1965); and *Anhydrides, supra*, at 1485. The latest trial court decisions which cite this principle are *Bethlehem Steel Company, Maryland Shipbuilding & Drydock Co. v. United States*, 238 F. Supp. 483, 490 (1964) *rev'd on other grounds*, 53 CCPA 142, C.A.D. 89: (1966), which cited both *Hartranft* and *American Net & Twine*; and *Pistorino & Company, Inc. v. United States*, 82 Cust. Ct. 168, 179-180, C.D. 4799 (1979), which cited both *Greek Orthodox Church* and *Benziger*, only one year before the last major revision of the

7. *See American Express Co., supra*; *Newhall, supra*; and *Goat and Sheepskin Import Co. et al. v. United States*, 5 Ct. Cust. Appls. 178, 183, T.D. 34254 (1914) [in these three cases, the Court of Customs Appeals reversed, giving the terms in issue an interpretation which favored the importer]; *United States v. Gavin & Co.*, 7 Ct. Cust. Appls. 292, 295, T.D. 36804 (1916); *United States v. Darling*, 10 Ct. Cust. Appls. 57, 58, T.D. 38334 (1920); *Central Vermont Railway Co., supra*; *United States v. Field & Co.*, 10 Ct. Cust. Appls. 183, 191, T.D. 38550 (1920); *Downing & Co. (Inc.) v. United States*, 12 Ct. Cust. Appls. 451, 454, T.D. 40614 (1925); and *Harry Zinberg v. United States*, 16 Ct. Cust. Appls 268, 275, T.D. 42870 (1928).

"customs courts' " jurisdiction, which further codified the independent nature of the courts' review.

Most of the cases discussed above which apply the *Hartranft* principle deal with classification provisions, and can be roughly grouped into those which adopt "broad" interpretations or definitions, including *American Net & Twine, supra*, at p. 57, which refused to limit the definition to the "most ordinary" form of the product, and those which adopt "limited" or "narrow" definitions or interpretations. In one case (*Rice, supra*, at pp. 911-12), the court, in adopting one of two possible interpretations of the term "and", very clearly states that it was prepared to adopt whichever interpretation favored the importer. What is common to all of these cases is the adoption by the court, in the case of ambiguity, of that interpretation which favors the importer.

The cases discussed above show that the general rule of administrative law that entitles an agency's interpretation of a statute to deference, applied in *Chevron, supra* ; *Smiley, supra*; *Citizens to Preserve Overton Park v. Secretary of Transportation*, 401 U.S. 402 (1971); and other administrative law cases, does not apply to customs revenue matters such as those involved in the instant case, and that such a rule is, in fact, the antithesis of *de novo* revue of Customs' classification and valuation determinations, with resolution of any ambiguities in favor of the importer.

C. A tariff term must be rendered entirely free from doubt before that term can be interpreted in a manner which disfavors the importer.

The circumstances where the *Hartranft* principle is to be applied are variously stated by this Court as "a doubt" (*United States v. Isham, supra*, at 504 and *Swan & Finch, supra*, at 146), "doubt" (*Hartranft, supra*, at 616, and *American Net & Twine, supra*, at 474), and "any fair doubt" (*Benziger, supra*, at 54). Most of the Court of Customs Appeals and Court of Customs and Patent Appeals opinions utilize similar language; some characterize the test as "entirely free from doubt" (*Michelin, supra*, at 527, and *Harper, supra*, at 105); and in *Sussfeld, supra*, at pg. 52, the Court equated ("it is equally true") the liberality in favor of the government in administrative law such as copyright (a principle of due deference requiring that the government's interpretation

should be sustained unless it is clearly wrong) to liberality in favor of the importer in construing revenue statutes. The principle is therefore a antithetical one, requiring that an interpretation in the importer's favor should be sustained unless clearly wrong.

Certain language, "equal and substantial balance in its favor," at p. 202 of *Hatters' Fur Exchange*, *supra*, (and "substantial doubt" which appears in the preceding sentence therein), and other *dicta*, would appear to make the standard one where the government would prevail upon something slightly beyond a mere preponderance in its favor of all the bases of judgment, but neither *American Net & Twine* nor *Eidman v. Martinez*, the two cases cited to in *Hatters' Fur Exchange*, nor any of the other decisions of this Court relying on this rule, so hold.

Even if the interpretation of the law in the importer's favor is not, in the language which the CAFC used in its opinion in *Springfield Indus. Corp. v. United States*, 842 F.2d 1284, 1285-86 (Fed. Cir. 1988), "what the court itself would otherwise have given it," and even if the government's interpretation might be the better one, the courts should adopt the interpretation which "favors" the importer. Presiding Judge Montgomery, feeling that the government's claimed alternative provision might be the better classification, stated in *Darling*, 10 Ct. Cust. Appls. 57, T.D. 38334 (1920) at p. 58 that:

> . . .[I] do not feel that I should permit such doubt as I possess to lead me to an insistence upon the contrary rule, in view of the other well-established rule that in case of doubt the question involved should be solved in favor of the importer, and this question is not free from doubt.

This is consistent with this Court's statement of the standard on the other hand, agency interpretation, in *Federal Election Comm'n*, *supra*, at p. 39:

> To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."

[Citations omitted].

Under the cases, the interpretation of a term or statute proffered by the importer need not be the only reasonable one, or the one the court would reach without applying the principle of liberal statutory interpretation in favor of the importer, to be sustained.

D. The principle of deference to an agency's interpretation of a statute does not apply to customs classification or valuation, where liberal interpretation in favor of the importer still applies. These antithetical principles have existed side-by-side for more than a hundred years.

> Where the burden is placed upon a citizen, if there be a doubt as to the extent of the burden it is resolved in favor of the citizen, *but* where a privilege is granted any doubt is resolved in favor of the government.

Swan & Finch, *supra*, at 146 (Emphasis added).

The principle with regard to privilege following "but" in the second half of the preceding sentence from *Swan & Finch* has been followed by the CAFC at the urging of the government several times in recent years. *Guess? Inc. v. United States*, 944 F.2d 855, 858 (Fed. Cir. 1991); *Chrysler Motors Corp. v. United States*, 945 F.2d 1187 (Fed. Cir. 1991). In holding on the principle governing privilege stated in the second half of the sentence, the CAFC in neither case addressed the corollary principle on liberal interpretation in favor of the importer stated in the first half, but in deciding *Anhydrides*, *supra*, at 1485, they specifically did so. The Solicitor General now contends that the CAFC, in *Anhydrides*, was in error in following this Court's holding in the first half of that sentence from *Swan & Finch*, but was correct in following the holding in the second half of the same sentence in *Guess?* and *Chrysler*. There has been no overruling by this Court of the principle stated in either half of that sentence from *Swan & Finch*, and it would take an extreme leap of faith to believe that one half of the sentence is still good law, but the other isn't. From *Rice* to *Anhydrides* there were major revisions of the tariff in 1909, 1913, 1922, 1930, 1962, and 1989. Had Congress, arguably being aware of the courts' holdings, wished to change this principle, it could have done so, but in the face of continuing reaffirmation of that principle by the courts, Congress has let it stand.

None of the decisions of **this Court** in customs-related cases, which the government cites in its brief as support for its claim that Customs' is owed deference in its interpretation of tariff statutes, are customs revenue cases. The closest is *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978), which involved the Treasury Department's[8] [not Customs'] interpretation of "bounty" in a countervailing duty case. In its decision, this Court recognized that the purpose of such provisions was not revenue, but to protect domestic industry "from unfair competition." 437 U.S. at 451. *Norwegian Nitrogen v. United States*, 288 U.S. 294, 315 (1933) also involved an agency other than customs, and a procedural, not a substantive, issue; the sufficiency of a hearing procedure before the then Tariff Commission [now United States Trade Commission], in a proceeding involving the flexible tariff provisions of § 315 of the Tariff Act of 1922 [now 19 U.S.C.§ 1336]. This Court has recognized that the purpose of those provisions is not "revenue," but instead equalization of costs of production, another unfair competition provision. *J.W. Hampton, Jr. & Co.*, 276 U.S. 394, 411-13 (1928). Such "international trade" cases have nothing to do with the principle of liberal interpretation of a term in favor of the importer in a tariff (revenue) law concerning valuation or classification. The one "customs" case from this Court which the government does cite, *United States v. Vowell and M'Lean*, 9 U.S. (5 Cranch) 368, 372 (1809), relates to entry and importation procedures, not the issues of classification or valuation which are subject to the *Hartranft* principle.

The only case in any court cited by the government in support of its claim for *Chevron*-type deference (*see* Brief for the United States, petitioner, at 18, footnote 7) which would appear on first examination to be a "customs" case, in fact, is not. *Goodman* is not a general valuation case, but a *Swan & Finch* "privilege" case involving a Free Trade Zone[9]. The distinction between valuation and classification, made by the Court in *IKO*, *supra*, at 626 in distinguishing the issue before it from that in *Goodman*, is meaningless, as neither classification or valuation issues

8. The Trade Agreements Act of 1979 transferred the responsibility for determining the applicable dumping duties from the Department of the Treasury to the Department of Commerce, International Trade Administration. *See* 19 U.S.C. § 1675(a). Such matters involve "trade," not "customs," issues.

9. That FTZ's involve *privilege* is stated in the statute itself: "*Provided*, That whenever the privilege shall be requested. . . ." 19 U.S.C. § 81c.

are subject to *Chevron* deference. The statement of the law in those cases, and others wrongly decided by the CIT, CCPA or CAFC without reference to the *Hartranft* principle, violates the principle of *stare decisis*.

The principles which should be applied in such cases might, for purposes of simplicity using a single decision of this Court for each principle where that factor was in issue, be designated as the 1) *Chevron* [administrative deference],[10] 2a) *Hartranft* [liberal construction in favor of the importer], and 2b) *Swan & Finch* [strict interpretation of privilege][11] principles.

Once the distinctions between these various type of cases is recognized, it becomes apparent that the government's position here is inconsistent with that which it has taken in other recent matters. In addition to citing *Swan & Finch* in *Guess?*, *supra*, and to the court below in *Chrysler, supra*, Customs itself has cited *Hartranft* at least 5 times in the last 15 years (*See* HQ Rulings 559057, 734301, 555032, 554592, and 650376), for another holding, and the principle that underlies *Hartranft* only a year ago, in Customs HQ Ruling 958647, June 16, 1997:

> Finally, even were Customs to agree that there is substantial doubt as to the construction Congress intended to give to Additional U.S. Note 5(a), the U.S. Court of Customs and Patent Appeals (now the U.S. Court of Appeals for the Federal Circuit) has held that it is proper to resolve the doubt in favor of the importer. *U.S. v. Kurt Orban*, 47 CCPA 28, C.A.D. 724 (1959).

In all The Solicitor General argues that an importer seeking review of Customs interpretations of the tariff acts imposing higher duties on the importer should be faced at the beginning with the prospect of a very

10. *See also Overton Park, supra*; *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 877, 894-95 (1995); *Miller v. Youakim*, 440 U.S. 125, 145 n.25 (1979); *Federal Election Comm'n v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 31 (1981) and *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 233 (1986). (At times parties, or the courts, in customs matters have cited to other cases such as these for the *Chevron* principle).

11. *See also Chrysler Motors Corp. v. United States* [drawback], 945 F.2d 1187 (Fed. Cir. 1991); and *Goodman Manufacturing, L.P. v. United States* [FTZ], 69 F.3d 505, 510 (Fed. Cir. 1995).

difficult hurdle to overcome: showing that Customs' interpretation was "unreasonable," even though the importer's position might be as reasonable, or even more so. This is contrary to hundreds of years of common and statutory law in this country, which require that the courts conduct *de novo* review of those interpretations, under current law considering even new issues of law and factual proofs not before the agency when it made its determination, and only then at the **end** of this process (in Customs' own words in the ruling quoted, "finally"), where all of the necessary facts have been established, all of the issues of law have been considered, relevant principles of statutory construction have been applied, and all of the indicators of legislative intent examined[12], and some doubt still remains, resolve that doubt in favor of the importer by refusing to assess the importer with those higher duties, where Congress did not evidence a clear intent to do so.

II. NO INTERVENING DECISION OF THIS COURT OR LEGISLATION HAS ABROGATED THE *HARTRANFT* PRINCIPLE.

A. Earlier cases have rejected the extension of *Chevron*-type deference to customs issues, in decisions which distinguish between customs and other areas of the law.

The government argued in *Semperit Indus. Prods. v. United States*, 852 F. Supp. 1292, 1299-1300 (CIT 1994), as it has argued regularly since, that its classification should be given "due deference," and should be sustained "unless there are compelling indications that it is wrong." These arguments were rejected by the CIT in an analysis which cited no cases applicable to duties.[13] The opinion does cite administrative law cases not involving duties, and counsel seem to have cited none of the

12. *See Sturm, supra*, at § 51, where these aids to construction, as regularly applied by the "customs" courts, are examined, from "absurd or anomalous results," to "*expressio unius est exclusio alterius.*"

13. *Semperit*, a classification case under the HTSUS, in an opinion which is a good summary of the CIT's jurisdiction, recognized the difference between the standard of review in "customs" cases (classification and valuation) on the one hand, and antidumping and countervailing duty cases on the other. The CIT did this based on logic, without going into the extensive body of case law from this Court on liberality in favor of the importer's interpretation in "customs" cases, and therefore stopped short of enunciating the full, proper, rule.

applicable decisions of this Court or the Courts of Appeals, nor argued that they had been overruled.[14]

Issues similar to those on which the government based its argument in *Semperit*, whether differences exist between customs law and other law, had been dealt with eighty-five years earlier, where the court distinguished the courts' liberality in interpreting copyright laws in favor of the government from the principle applicable to customs classification cases. In *United States v. Sussfeld*, *supra*, at p. 52, the court stated:

> We need not determine whether counsel for the Government is correct in asserting that the courts are uniformly liberal in construing the copyright laws. If he is correct in this, it is equally true that the courts are liberal in favor of the importer in construing revenue statutes.

(Citations omitted).

For cases involving customs duties (classification or appraisement), the court can apply the correct law by reference to its own decisions, and should bring to an end citations by the courts below to *Chevron* and similar administrative law cases, in customs revenue cases where their holdings do not apply.

B. Such a well established principle of law as the *Hartranft* principle should not be overruled unless it can be shown to be unworkable, or the decisions on which it is based poorly reasoned.

A question repeatedly decided by this Court is settled beyond further discussion. *Wright v. Sill*, 67 U.S. 544-45 (1863). Even this Court is bound to follow its own precedents where the cases are "too firmly fixed in the . . . jurisprudence to be now displaced." *Bennis v. Michigan*, 517 U.S. 442, 453 (1996)[15], quoting *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921).

14. The government has conceded that none of the authorities cited above have been expressly overruled. "While we know of no authority that has expressly rejected that rule of construction, the courts appear to have ignored it in favor of the statutory presumption of correctness." Brief in *Marubeni America Corporation v. United States*, *supra*, for the United States, appellee, at p. 30.

15. Although the earliest case quoted here goes back to 1838, only 11 (Cont'd)

The considered practice is not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases, *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962), but "even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.' " *Payne v. Tennessee, supra*, at 842 (SOUTER, J., concurring) (quoting *Arizona v. Rumsey*, 467 U.S. 202, 212 (1984)). So that a principle developed in a line of cases such as those discussed here is even more bound by precedent than that in *Bennis*, which involved constitutional (Fourteenth and Fifth Amendment) principles.

In *United States v. International Business Machines*, 517 U.S. 843 (1996), the government below had pointed to a line of decisions on a related Constitutional provision, which arguably raised a question concerning what this Court's reasoning on the issue actually involved in *IBM* might be. Despite what the majority called the dissent's "speculative protestations" as to the uncertainty in commercial transactions which might be caused by the application of the finding in *Thames & Mersey*, this Court, citing *Payne, supra*, at 827, and *Smith v. Allwright*, 321 U.S. 649, 665 (1944), held that "*Thames & Mersey* has been controlling precedent for over 80 years, and the government does not, indeed could not, argue that the rule established there is 'unworkable.' " *IBM, supra*, at 856. Here there is no line of decisions rejecting or even raising a question as to the reasoning on which *Hartranft* and the other precedents in issue rest, none of the cases cited by the government in support of its position even cite *Hartranft* or its related cases, and in the face of no argument by the government as to any theory under which such longstanding precedent should be overruled, the principles that animate the policy of *stare decisis* should cause the Court to decline to do so.

C. Enactment of 28 U.S.C. § 2643(b) did not affect the *Hartranft* principle, and any inferences to the contrary drawn from the opinions in *Jarvis Clark* or other CIT/CAFC cases are misplaced.

One of the stated bases for the decision below, and its rejection of the government's plea for deference, is the decision in *Jarvis Clark, supra*.

(Cont'd)
years after the earliest precedent analyzed in *Bennis*, the authorities cited in the cases quoted here carry the principle applicable back to precedents even earlier than those cited in *Bennis*.

For a good discussion of that case, as related to the history of the customs courts, their jurisdiction, and the nature of proceedings in them, *see* Judge Pogue's opinion in *Anval Nyby Powder AB v. United States*, 927 F. Supp. 463, 468-69 (CIT 1996). That opinion also discusses how the operation of 28 U.S.C. §§ 2638, 2640(a), and 2643(b), among other factors, are inconsistent with giving deference to Customs Service interpretations of tariff acts. The government argues (Brief for the United States, Petitioner, at p. 19) that

> [r]espondent fails, however, to identify any specific language in any of these additional statutory provisions that addresses the degree of deference to be given to Customs Service interpretations of the Tariff Act [of 1930].

Reference to Judge Pogue's opinion, where the substance of those provisions is relied on, rather than "any specific language," should satisfy this Court. Why should there be, in the Tariff Act, "any specific language" addressing deference to Customs Service interpretations of the Tariff Act, when such a concept is totally alien to customs jurisprudence, and has been for 150 years?

The "dual burden" now codified under 28 U.S.C. § 2639(a)(1) requires the importer to prove Customs' classification to be incorrect, and its own claimed classification to be correct. Prior to 1980, this led to situations where the courts let an action by Customs stand, although it had been proven to be incorrect, because the "correct" classification had not been proven by the importer. The usual language used in opinions prior to the enactment of 28 U.S.C. § 2643(b), and its interpretation in *Jarvis Clark*, where the importer failed to carry the second part of the dual burden, and plead or prove the proper claim, was to "overrule [the importer's claim] without affirming the decision of the collector." *Marks Bros., Inc. v. United States*, 7 Cust. Ct. 53, 63, C.D. 534 (1941), *aff'd*, 30 CCPA 35, CAD 210 (1942). *Jarvis Clark* recognizes (at p. 876) that the dual burden arises out of the "formalities of pleading," and seems to recognize that the effect of the dual burden's modification through § 2643(b) is limited to providing for the curing of defects of factual proof, which occurred either because that classification had not been claimed by the importer in its protest or pleading, and thus no proof had been adduced with regard to it, or merely because the proofs at trial were, to the court, insufficient. If an importer wished to further pursue

the issue, it was necessary to begin a new case. The purpose of § 2643(b) enacted as part of the Customs Courts Act of 1980, 94 Stat. 1727 was to eliminate such wasteful retrials. Although Representative Vanik stated that purpose as "eliminat[ing] the old double burden of proof,"[16] its purpose in fact was not to eliminate the dual burden, but to eliminate a costly result of it; trials which let admittedly incorrect classifications stand.

Such defects of factual proof, where the "evidence presented," in the words of § 2643(b), was insufficient, are curable either by remand or retrial at the discretion of the court. Defects in pleading, or failure to claim the "correct" classification, the other grounds which formerly resulted in affirmance of "incorrect" classifications, are curable under 28 U.S.C. § 2638, the successor to a provision adopted earlier, which permits the CIT to entertain new claims.

Even a cursory examination of the published decisions of the CIT will show that § 2643(b) is very rarely applied. That section is conditional, applying only if the evidence before the CIT is insufficient for the court to render a decision. Review by the courts was already *de novo* on both the facts and the law, and remand in a relatively few cases for proof of missing facts cannot be said to militate against deference to the government more strongly than that standard. In fact what such remand did was expand the already extensive jurisdiction of a very specialized court.

Whether the court has power of remand for proof of facts does not affect the principle of liberal interpretation in favor of the importer. The courts, under the provisions of the administrative act of June 10, 1890, 26 Stat. 136, had the power to remand for further evidence, which power was taken away by section 28 of the act of August 5, 1909, 36 Stat. 98 (*see Stegeman v. United States*, 1 Ct. Cust. Appls. 208, 209, T.D. 31240 (1911) for a history) because the practice of trying a case piecemeal had fallen into disfavor with the courts. The *Hartranft* principle is no more affected by the 1980 reinstitution of a provision for evidentiary remand in 28 U.S.C. § 2643(b) than it was by the 1909 elimination of such a provision. In 1980 the burden of retrying cases had apparently found

16. Hearings before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, 96th Cong., 2d Sess., on the Customs Courts Act of 1980, February 13 and 28, 1980, p. 296.

disfavor sufficient to tip the balance against the burden of piecemeal litigation which had spurred the 1909 change.

D. The grants of authority cited by the government are limited, and do not constitute such a general grant of authority as to permit it to legislate through rulemaking.

The Solicitor General quotes various snippets of language at pp. 12-14 of his brief, in support of a claim that Congress has delegated to Customs some broad power to limit customs revenue provisions by way of regulation or other interpretation. There is no showing of any considered intent of Congress, in any of the extensive legislative history on the many revisions of the tariff laws, to transfer responsibility for interpretation of the tariff from the courts to Customs. To infer an intent to effectuate such a major change in roles from such brief references alone is overreaching, but a closer examination of those provisions, in context, reveals that even they do not support the government's claim.

The first provision cited to provides authority to the Secretary of the Treasury:

> to issue rules and regulations governing the admission of articles under the provisions of the [tariff] schedules.

19 U.S.C. § 1202 (1982), General Headnote 11 of the TSUS. The delegation of regulatory authority in this first part of General Headnote 11 was only with regard to "the admission of articles." "Admission" is a clearly defined concept within customs, and does not include dutiability, classification, or valuation. *See Inner Secrets/Secretly Yours, Inc. v. United States*, 885 F.Supp. 248, 256 (Fed. Cir. 1995), and 19 CFR § 141.113, cited therein.

Just as the provision on remand in 28 U.S.C. § 2643(b) is contingent on a failure of proof of facts in a customs case, the second basis claimed as support for Customs' regulation here, the power to issue rules or regulations contained in the latter part of General Headnote 11, was dependent on the inability to determine the facts which would establish eligibility for total or partial duty relief from an examination of the article itself in its condition as imported.

> The allowance of an importer's claim for classification, under any of the provisions of the schedules which provide

> for total or partial relief from duty or other import restrictions **on the basis of facts which are not determinable from an examination of the article itself in its condition as imported**, is dependent upon his complying with any rules or regulations which may be issued pursuant to this headnote.

General Headnote 11, TSUS (emphasis added). There is no such power granted by Congress for those situations where the facts establishing eligibility can be determined on importation. This "partial" power is consistent with the provisions of Par. 1615 of the Tariff Act of 1930, from which Item 807.00, TSUS and subheading 9802.00.80, HTSUS, were derived. *See* Appendix 4a-5a. In that provision, the authority to issue regulations was similarly very limited, being delegated only with regard to "proof of the identity of such articles," or the "conditions and regulations" under which repaired articles could be returned. The number of very specific conditions as to eligibility or handling of the goods themselves, imposed directly by Congress in the statute, are also inconsistent with a delegation of broad regulatory authority.

The government's third alleged basis, 19 U.S.C. § 1500(a), (b), falls short as broad authority with regard to classification and valuation, when one examines the heading to those sections: "**§ 1500. Appraisement, classification, and liquidation PROCEDURE.**" [Emphasis added]. The limited authority delegated, and the type of that authority, is consistent with this Court's limitation of Customs' regulatory authority to procedural matters, in *Morrill v. Jones*, 106 U.S. 466, 467 (1882):

> The Secretary of the Treasury cannot by his regulation alter or amend a revenue law. All he can do is to regulate **the mode of proceeding** to carry into effect what Congress has enacted.

(Emphasis added).

The fourth basis, the government's quotation in its footnote 2, at page 13, from the Conference Report issued in the process of adopting the HTSUS, "[t]he Customs Service will be responsible for interpreting and applying the [Harmonized Tariff Schedule of the United States]" (H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549-550 (1988), is only

partial, and, as stated, is misleading. It omits the beginning of the paragraph from which the quotation is taken, which starts at the same page:

> Sections 1209 and 1210 set out the roles of the United States agencies principally responsible for the Harmonized System. These provisions are meant to ensure a broad base of participation in the work relating to the HTS and the Convention.

Sec. 1209 is captioned "**COORDINATION OF TRADE POLICY AND THE CONVENTION,**" and **Sec. 1210**, "**UNITED STATES PARTICIPATION ON THE CUSTOMS COOPERATION COUNCIL REGARDING THE CONVENTION.**" Neither has anything to do with the assessment or collection of duties.

Thus, although Customs as an agency has the power under the statute, and this Court's decision in *Morrill*, to regulate procedures, it does not have the power to limit substantive provisions which deal with classification or valuation, as enacted by Congress. The very last case that the government cites, *United States v. Vowell and M'Lean*, *supra*, merely emphasizes this constraint. The "tariff legislation" being interpreted there related to the procedural aspects of entry and importation, not to classification or valuation.

E. The history of legislation with regard to customs matters has been to expand the courts' jurisdiction; not to limit it by granting the agency the power to limit the scope of duly enacted tariff legislation through administrative interpretations.

The government has established in its brief that there is a long line of decisions applying deference to the regulatory and other interpretations of legislation by agencies other than Customs. The government has not established that there is any decision by this Court, or any court having the relevant precedents before it, applying that deference to determinations on customs classification or valuation. Had Congress wished to change the law with regard to Customs, and grant *Chevron*-type deference to determinations by Customs, it has had numerous opportunities to do so, both before and after the decision in *Chevron*. The government might

even have tried to argue that *Chevron* changed the law, creating new law applying to all agencies, including Customs. But the very argument that the government makes to establish that the principle of deference to determinations by agencies other than Customs is longstanding, emphasizes the difference between the law applicable to those agencies and to Customs, because the contrary law applicable to Customs' determinations is just as longstanding. We are not dealing here with "remedial laws or laws founded upon any permanent public policy," but with the "revenue" laws, which Justice Story carefully distinguished from those others in *United States v. Wigglesworth,* 28 F.Cas. 595, 596-97 (C.C.D. Mass. 1842), in liberally interpreting a customs revenue law in favor of the importer.

It has long been recognized that the tariff acts are drafted in terms of trade, and are not particularly susceptible of uniform interpretation by administrative officials. As Mr. Justice Story explained, because the tariff acts were originally designed as a source of revenue, their classification categories were phrased "according to the general usage and known denominations of trade." *Two Hundred Chests of Tea*, 22 U.S. (9 Wheat.) 430, 438 (1824). Their interpretation, and uniform application, has historically been left to the courts.

Customs law begins in the United States with the second act of our Congress, the Act of July 4, 1789, S.L., Vol. 1, Chap. II, "*An act for laying a duty on goods, wares, and merchandise imported into the United States.*" The power of Congress to lay and collect such duties is specifically set out in the Constitution itself, in Article 1, Section 8, Clause 1. By 1909, shortly after this Court's last decision on the *Hartranft* principle had been handed down in *Benziger*, there had been 261 tariff acts passed by the Congress, or resolutions or proclamations explaining, modifying, or effectuating those various acts. *See* "Tariff Acts Passed by the Congress of the United States from 1789 to 1909," House of Representatives Document No. 671, 61st Congress, 2d Session (1909).

The present tariff law of the United States is contained, for the most part, in the Tariff Act of 1930, as amended, which is codified in Title 19 of the United States Code. There have been major revisions with regard to classification, in 1962, in the Tariff Classification Act of 1962, Titles I and II of Pub. L. 87-456, May 24, 1962, 76 Stat. 72, which adopted the Tariff Schedules of the United States, and in 1988 with section 1207 of

the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, which adopted the Harmonized Tariff Schedule of the United States. There have been major revisions of the law with regard to valuation in 1956, with the Customs Simplification Act of 1956, August 2, 1956, 70 Stat. 943, and in 1979, with the Trade Agreements Act of 1979, Pub. L. 96-39, 93 Stat. 144, 194 (1979). Despite these very major revisions, the basic law is still contained within the framework of the 1930 Act.

The legislative scheme of United States tariff laws has not been a broad framework of enabling legislation, with recognized gaps left to the agency to fill, as is the case with the administrative laws creating or to be administered by other agencies. The tariff laws are, rather, very detailed and specific legislation, with Congress revisiting certain areas time and time again, to refine and alter the law. Congress has never delegated this power to the agency, but has instead specifically empowered the courts to ensure uniformity in the law. The 1980 Customs Courts Act, adopted four years before *Chevron*, confirms that the burden of interpreting the tariff laws, and making their application uniform, was squarely on the courts, and even expands that jurisdiction.[17]

Where the courts, in fulfilling this role of providing uniform decision and national consistency, have held that the agency, Customs, has overstepped its bounds in adopting regulations, Congress has, as it thought appropriate, either let those decisions stand, or enacted legislation to overturn them. *See, for example*, Sen. Rept. No. 101-252 to accompany

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17. Hearings before the Subcommittee On Monopolies and Commercial Law of the Committee On the Judiciary, on the Customs Courts Act of 1980, H.R. 6394, February 13 and 28, 1980. Statement of Congressman Seiberling, "Act will create a comprehensive system of judicial review of civil actions arising from import transactions, utilizing the specialized expertise . . . to assure a national consistency . . ." *Id.* At 1; testimony of Senator Dennis DeConcini,

> The U.S. Court of International Trade would continue to be equipped with the same expertise and specialized skills . . . to insure uniformity of decision and policy to litigants with regard to the adjudication of disputes involving import transactions."

Id. at 3; statement of David M. Cohen, Director, Commercial Litigation Division, Department of Justice, "The bill will take advantage of the expertise of the Customs Court and will ensure uniformity in the important area of international trade." *Id.* at 53.

the Customs and Trade Act of 1990, p. 44, 1990 U.S.C.C.A.N. 971, explaining Congress' overruling of the result in *Madison Galleries, Ltd. v. United States*, 870 F.2d 627 (Fed. Cir. 1989). There Customs had sought to limit the eligibility of certain goods for classification under another duty preference provision (the Generalized System of Preferences for eligible developing countries ("GSP")) through adoption of a regulation, much as it did in this case and in *Morrill v. Jones, supra*. Had Congress been shocked by the courts' failure to give deference to Customs' regulation in *Madison Galleries*, it could have amended the law to grant Customs such deference, rather than merely amend the law. *See also* H.R. No. 98-1015 to accompany the Trade and Tariff Act of 1984, p. 68, 1984 U.S.C.C.A.N. 5027, explaining Congress' overruling of the result in *United States v. Heraeus Amersil, Inc.*, 671 F. 2d 1356 (CCPA 1982). That case did not involve a substantive issue of classification or valuation, but a procedural issue as to when increased duties were payable. Notwithstanding that 19 U.S.C. §§ 105(b) and 1515(a), the sections which Customs cited as the authority for its regulation, had twice been reenacted after adoption of the disputed regulation, 19 CFR 24.3(e), the courts held the regulation to be invalid, as specifically inconsistent with the statute. Congress has already revisited this area thrice[18] before settling on the current law, which is even yet the subject of active discussion. Had Congress been shocked by the courts' failure to give deference to Customs' regulation, it could have amended the law to grant Customs such deference, or the power to dictate the terms of such payments under regulation. Instead, it merely amended, and re-amended, the law.

The ultimate issue as to whether particular merchandise has been classified under an appropriate tariff provision necessarily depends on the meaning of the terms of that provision, which is a question of law. *See W.R. Filbin & Co. v. United States*, 945 F.2d 390, 392 (Fed. Cir. 1991). When, however, there is any ambiguity remaining in the term after all the other tools of statutory construction have been applied, that ambiguity should be resolved in favor of the importer. Justice Story stated this principle on resolving ambiguity in favor of the importer in 1838. In the intervening period, this Court has applied that principle in six cases,

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18. *See* amendments to 19 U.S.C.§ 1505 in the Trade and Tariff Act of 1984, Pub. L. 98-573, October 30, 1984, 98 Stat. 2948; Customs Modernization Act, Pub. L. 103-182, December 8, 1993, 107 Stat. 2205; and Pub. L. 104-295, October 11, 1996, 110 Stat. 3515.

and it has remained unchanged until now. The government, simply ignoring it altogether, has not shown that this principle is "unworkable" or "badly reasoned," and indeed could not do so, in the face of the many cases decided under it by the Board of General Appraisers, the Customs Court, the Court of Customs Appeals, and the Court of Customs and Patent Appeals. Any change in the principle applying to those laws of classification and valuation, which Justice Story characterized in *Wigglesworth* as "revenue" laws, as contrasted with "remedial laws," or "laws founded upon any permanent public policy," is for the Congress, not this Court.

CONCLUSION

For the foregoing reasons, the decision under review should be affirmed.

Respectfully submitted,

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APPENDIX A

APPENDIX A — LETTER OF THE UNITED STATES DEPARTMENT OF JUSTICE TO THE CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED NOVEMBER 25, 1996

U.S. Department of Justice

Civil Division

International Trade Field Office
212/264-9230
Commercial Litigation Branch
FTS/264-9230
JIL:mh 26 Federal Plaza, Room 34
New York, New York 10278-0140

November 25, 1996

Via Overnight Mail

Clerk of the Court
United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

Re: *IKO Industries, Inc. v. United States*,
Appeal 96-1111

Dear Clerk:

With respect to the above-captioned appeal, *IKO Industries, Inc. v. United States*, Appeal No. 96-1111, which was argued

Appendix A

on October 9, 1996, please be advised that a subsidiary issue briefed by the parties, involving the statutory presumption of correctness under 28 U.S.C. §2639 and whether the decision of the appropriate customs official is entitled to deference, is also present in each of the appeals noted below. A copy of this letter is being sent to counsel for each of the parties in these appeals, and it is requested that each of the panels assigned too these appeals be informed of the foregoing. For that purpose we are enclosing 21 copies of this letter. This advice constitutes a supplementation of our previously filed statements pursuant to Rule 47.5.

Marubeni America Corporation v. United States, Appeal No. 96-1310

Better Home Plastic Corporation v. United States, Appeal No. 96-1322
(set for argument on December 3, 1996)

Rollerblade, Inc. v. United States, Appeal No. 96-1397

Anhydrides & Chemicals, Inc. v. United States, Appeal No. 96-1344

Universal Electronics, Inc. v. United States, Appeal No. 96-1345

Anval NYBY Powder AB v. United States, Appeal No. 96-1438

Appendix A

Very truly yours,

JOSEPH I. LIEBMAN
Attorney in Charge
International Trade Field Office

cc: James Caffentzis, Esq. — Appeal No. 96-111
Richard C. King, Esq. — Appeal No. 96-1310
Peter J. Fitch, Esq. — Appeal Nos. 96-1322 and 96-1344
Fitch, King and Caffentzis

Robert Torreson, Jr., Esq. — Appeal No. 96-1397
Powell, Goldstein, Frazer & Murphy

Timothy B. Dyk, Esq. — Appeal No. 96-1345
Jones, Day, Reavis & Pogue

Philip Yale Simons, Esq. — Appeal No. 96-1438
Simons & Wiskin

APPENDIX B — TARIFF ACT OF 1930, PARAGRAPH 1615

Tariff Act of 1930

1615. Articles the growth, produce, or manufacture of the United States, when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means if imported by or for the account of the person who exported them from the United States; steel boxes, casks, barrels, carboys, bags, and other containers or coverings of American manufacture exported filled with American products, or exported empty and returned filled with foreign products, including shooks and staves when returned as barrels or boxes; also quicksilver flasks or bottles, drums of iron, steel, or other metal of either domestic or foreign manufacture, used for the shipment of acids, or other chemicals, which shall have been actually exported from the United States; but proof of the identity of such articles shall be made, under general regulations to be prescribed by the Secretary of the Treasury, but the exemption of bags from duty shall apply only to such domestic bags as may be imported by the exporter thereof, and if any such articles are subject to internal-revenue tax at the time of exportation, such tax shall be proved to have been paid before exportation and not refunded; photographic dry plates and films of American manufacture (except moving-picture films to be used for commercial purposes) exposed abroad, whether developed or not, and photographic films light struck or otherwise damaged, or worn out, so as to be

unsuitable for any other purpose than the recovery of the constituent materials, provided the basic films are of American manufacture, but proof of the identity of such articles shall be made under general regulations to be prescribed by the Secretary of the Treasury; articles exported from the United States for repairs may be returned upon payment of a duty upon the value of the repairs at the rate at which the article itself would be subject if imported, under conditions and regulations to be prescribed by the Secretary of the Treasury: *Provided*, That this paragraph shall not apply to any article upon which an allowance of drawback has been made, the reimportation of which is hereby prohibited except upon payment of duties equal to the drawbacks allowed; or to any article manufactured in bonded warehouse and exported under any provision of law; except that it shall apply to articles (not dutiable under section 504 as unusual coverings and containers) used as coverings or containers for merchandise not subject to an ad valorem rate of duty: *Provided further*, That when manufactured tobacco, which has been exported without payment of internal-revenue tax, shall be reimported it shall be retained in the custody of the collector of customs until internal-revenue stamps in payment of the legal duties shall be placed thereon: *And provided further*, That the provisions of this paragraph shall not apply to animals made dutiable under the provisions of paragraph 1606.

(6)

Supreme Court, U.S.
FILED
DEC 7 1998
CLERK

No. 97-2044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA,

Petitioner,

v.

HAGGAR APPAREL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION IN SUPPORT OF RESPONDENT HAGGAR APPAREL COMPANY

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SIDNEY N. WEISS

Dated: December 4, 1998

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No. 97-2044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA,
Petitioner,

v.

HAGGAR APPAREL COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION IN SUPPORT OF RESPONDENT HAGGAR APPAREL COMPANY

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Customs and International Trade Bar Association ("CITBA") submits this brief in support of the position of the Respondent, Haggar Apparel Company, seeking affirmance of the decisions of the courts below.

[1] This brief was drafted entirely by counsel for *amicus curiae* Customs and International Trade Bar Association, without assistance, monetary or otherwise, from counsel for either party. CITBA has long been recognized by Congress in comments made upon pending customs and tariff legislation. *See, e.g.*, S.Rep. No. 91-576, to accompany S. 2624, 91st Cong., 1st Sess., (1969), at 6 (recognizing CITBA's predecessor, the Association of the Customs Bar).

The Customs and International Trade Bar Association is comprised of attorneys who practice exclusively or almost exclusively in the area of customs and international trade law. The issue which is presented to the Court in this case is of the utmost importance because the opinions of the courts below accurately reflect the longstanding role of the judiciary in reviewing classification decisions of the United States Customs Service. In CITBA's view a reversal of the decisions of the courts below would not only be contrary to the clear language of the statutes governing the review of such decisions, as supported by the legislative histories; it would also seriously undermine the Constitutional requirement for uniformity in the treatment of imported articles. Reversal of the decisions of the courts below would eviscerate the reviewing role that Congress contemplated for those courts.

STATEMENT OF CONSENT

Amicus curiae, Customs and International Trade Bar Association has obtained the consent of both parties to the filing of this brief in support of Haggar Apparel Company as indicated in the enclosed letters.

SUMMARY OF ARGUMENT

1. The statutory framework governing judicial review of classification decisions of the United States Customs Service ("Customs Service") directs the specialized tribunals which have jurisdiction over such matters to exercise *de novo* review of the administrative decisions brought before them. These specialized tribunals have exercised *de novo* review in this area for over a century as reflected in a vast body of case law. Deference is such cases is therefore inappropriate.

2. In its most recent re-enactment of this statutory framework, Congress reaffirmed the subject matters which would be subject to *de novo* review by the United States Court of International Trade ("CIT") and the United States Court of Appeals for the Federal Circuit ("CAFC"). The classification

issue presented in this case is included in the description of civil actions brought under 28 U.S.C. § 2640(a) subject to *de novo* review, or as stated in the statutory language, which are subject to "determinations upon the basis of the record made before the court."[2] 28 U.S.C. § 2640(a) describes "civil actions contesting the denial of a protest under section 515 of the Tariff Act of 1930." This action was brought under 28 U.S.C. § 2640(a).

3. The General Rules of Interpretation ("GRIs") set forth in the tariff governing the classification of all imported merchandise, establish a framework for interpretation of the Harmonized Tariff Schedules of the United States ("HTSUS"), codified at 19 U.S.C. § 1202, which allows for only one correct result. Therefore, the notion of *Chevron*[3] deference, which contemplates a range of permissible interpretations, if allowed in classification cases, such as the one in issue here, would be inconsistent with the proper implementation of the HTSUS.

4. This position is further supported by 28 U.S.C. § 2643(b) because it requires, that, in all cases the CIT reach a "*correct decision.*" The Government has argued that this is "simply" a procedural statute which allows the CIT to order further administrative or adjudicatory proceedings if it is not satisfied with the evidence submitted before it in the initial proceeding. In fact, 28 U.S.C. § 2643(b) significantly expanded the court's procedural powers, and gave the CIT the authority to reach a determination which is different from any of the positions argued by any of the parties. This authority, in the case of actions brought under 28 U.S.C. § 2640(a), is consistent only with *de novo* review, because in enacting this statute Congress directed the court to make its determinations on the basis of the record made

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[2] The CAFC has recognized that this language provides for *de novo* review by the CIT. *See, e.g., Universal Electronics, Inc. v. United States*, ___ Fed. Cir. (T) ___, ___, 112 F.3d 488, 493 (1997); *United States v. Cherry Hill Textiles, Inc.*, ___ Fed. Cir. (T) ___, ___, 112 F.3d 1550, 1557 (1997); *ITT Corp. v. United States*, ___ Fed. Cir. (T) ___, 24 F.3d 1384 (1994).

[3] *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984).

before the court, and *not* on the administrative record.

5. The presumption of correctness of a Customs Service decision recognized by the lower courts is a rule of evidence which shifts the burden of proof to the party challenging a decision of the Customs Service and is codified at 28 U.S.C. § 2639(a). The statutory scheme does not call for or justify a separate right of deference for the Customs Service by the specialized courts reviewing classification decisions.

6. In any event, the Customs Service regulation in issue, 19 C.F.R. § 10.16(c) (hereinafter referred to as "the Regulation"), which seeks to provide guidance to a perceived ambiguity in the language of subheading 9802.00.8000 of the Harmonized Tariff Schedules of the United States ("HTSUS"), should not be entitled to deference, even under the *Chevron* standard because, as found by the CIT as well as the CAFC, its language is contrary to the statute.

7. The Regulation is also not due *Chevron* deference because the Customs Service never intended that the courts give deference to the Regulation. Customs itself described the Regulation as an interpretive regulation that was intended only to provide guidance and definitions. The Customs Service stated that the Regulation was not "intended to restrict the legal right of importers or others to a judicial review of the matters contained therein."

ARGUMENT

I. Introduction

The case presented to this Court is one which is limited to judicial review of an interpretative regulation issued by the Customs Service to provide "guidance and definitions" in understanding a legal concept provided for under one section of the tariff classification provisions, enacted by Congress as subheading 9802.00.8000, HTSUS. The regulation addresses the interpretation of the statutory phrase "operations incidental to the assembly process." Civil actions brought to dispute the government's interpretation of this statutory language must be

brought under 28 U.S.C. § 2640(a). Such actions are claims initiated by importers/taxpayers to recover excess customs duties. All actions brought under 28 U.S.C. § 2640(a) are subject to a trial *de novo*, as discussed below.

II. The Statutes Governing Judicial Review of Classification Decisions of the Customs Service Provide for *De Novo* Review by the Courts

The Customs Courts Act of 1980, P.L. 96-417, 94 Stat. 1727 (1980), empowers the CIT to exercise jurisdiction over matters arising out of the laws governing the importation, exportation and admissibility of merchandise. Furthermore, it was enacted with the intention of promoting the Constitutional requirement of uniformity of treatment of all imported merchandise, as set forth in Article I, Section 8, which reads:

> The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

The House Report on the Customs Court Act of 1980 quotes then-Chief Judge Edward D. Re of the United States Customs Court as stating that the Act would:

> implement the constitutional mandate, which provides that 'all Duties, Imposts, and Excises shall be uniform through the United States', by utilizing the national jurisdiction of the Customs Court *to provide uniform and consistent interpretation and application of the laws involved in disputes arising out import transactions.*

H.R. Rep. No. 96-1235, 96th Cong., 2nd Sess., at 29, *reprinted in*,

1980 U.S.C.C. & A.N. 3729, 3741 (emphasis added).

With respect to 28 U.S.C. § 2643(b), the House Report makes clear that neither the court nor the importer should be constrained by a prior Customs determination with respect to review of a protest denial under section 515 of the Tariff Act of 1930.[4] Congress also recognized the *de novo* nature of the court's review of Customs Service decisions.

> Under the Customs Courts Act of 1980, the filing and denial of a protest will continue as prerequisites to the commencement of a civil action brought pursuant to proposed section 1581(a). *In addition, the bill preserves the right to a trial de novo for the review of a denied protest.*

H.Rep. No. 96-1235 at 44, *reprinted in*, 1980 U.S.C.C. & A.N. at 3755 (emphasis added).

Congress recognized that trial *de novo* was necessary if the Constitutional mandate to achieve uniformity was to be followed. In fact, throughout the history of this nation, the various judicial bodies charged with reviewing the classification decisions of the Customs Service have had this power. In addition, the history of the enactments of the various tariff laws and the ensuing litigation of Customs classification decisions before those judicial bodies consistently reflects the longstanding independent review conducted by the courts. The history of the tariff laws and the decisions interpreting those laws begins with the founding of our nation.[5]

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[4] H.Rep. No. 96-1235 at 60-61, *reprinted in*, 1980 U.S.C.C. & A.N. at 3772. The action before this Court results from the denial of Haggar's protest under section 515.

[5] Congress established a customs tariff and imposed duties on imported goods by the Tariff Act of July 4, 1789, ch. 2, 1 Stat. 24. Congress established the first laws pertaining to the administration of the tariff in 1789, and amended those laws in 1799. Act of July 31, 1789, ch. 5, 1 Stat. 29; Tariff Act of Mar. 2, 1799, ch. 22, 1 Stat. 627. The 1799 Tariff Act

provided the foundation upon which all subsequent tariff laws prior to 1922 were based. H.R. Rep. No. 248, 67th Cong., 1st Sess. 20 (1921). The most important customs officer at the time was the collector in each port of entry, who applied the tariff to imported goods by determining the classification and rate and amount of duty, and who collected duties from the importer.

Actions at common law against the decision of the collector were recognized by the courts. *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137, 156 (1836) (recognizing right of recovery against collector where importer notice is given to the collector at time of payment of dispute). Federal courts were given original jurisdiction over the acts of customs officials in 1833. Tariff Act of Mar. 2, 1833, ch. 57, § 2, 4 Stat. 632.

In the period from 1890 to 1920, specialized customs tribunals were enacted by Congress in order to alleviate the burdens placed on circuit courts hearing customs cases. In 1890, Congress created the Board of General Appraisers ("BGA"), and abolished the formal right of action against customs officials. Tariff Act of June 10, 1890, Ch. 407, 26 Stat. 131. The nine general appraisers, who were officials of the Treasury Department, heard and decided appeals from appraisement and classification decisions by customs officials at the ports of entry. Classification decisions were subject to judicial review of the law and facts involved, in the circuit court. Tariff Act of 1890, § 15. The BGA was empowered, in classification cases, to "examine and decide" the issues. Tariff Act of 1890, § 14. On appeal, the record made before the BGA was transmitted to the circuit court, but the case could then be referred to a general appraiser for receipt of further evidence. *Id.* In practice, the BGA adopted quasi-judicial procedures, particularly in classification cases. *See*, Reed, *The Role of Federal Courts in U.S. Customs & International Trade Law* (Oceana, 1997), at 83 (hereinafter "Reed").

To combat abuses by importers who would withhold evidence from the BGA in order to present it to the circuit courts, in 1908, Congress required importers to present all their evidence to the BGA. In 1909, Congress provided for a specialized appellate body, the Court of Customs Appeals, or CCA, which took over review of all customs cases from the circuit courts. Act of May 27, 1908, chap. 205, § 2, 35 Stat. 403; Act of August 5, 1909, Ch. 6, § 28, 36 Stat. 11, 105. The CCA exercised "exclusive appellate jurisdiction" to review classification and other non-appraisement cases. *Id.*, at 106. The CCA thus had funneled to it all cases pending at the time of its organization in the circuit courts. Reed, *supra*, at 89.

In recognition of the BGA's judicial nature, its name was changed to the United States Customs Court in 1926. Tariff Act of May 28, 1926,

As set forth in Note 5, the decisions of the Customs Service and its predecessor bodies were reviewed by independent

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Ch. 411, 44 Stat. 669; *cf.*, *Stone, Whitridge, White & Co. v. United States*, 129 F. 33, 36 (4th Cir. 1904) (holding that BGA was an independent tribunal, "no more subordinate to the Treasury Department than is any other court"), *rev'd on other grounds sub nom.*, *United States v. Whitridge*, 197 U.S. 135 (1905). The 1926 Act changed not only the name of the BGA, but also its fundamental character, from that of an administrative body to a judicial one; its decisions became the first stage of judicial review. Reed, *supra*, at 109-110. In 1929, the CCA became the Court of Customs and Patent Appeals, by virtue of the addition of appeals from the U.S. Patent Office. Both the CCA and the Customs Court were determined by the Supreme Court to be legislative Article I courts in 1929, which decision was in effect overturned by legislation declaring in 1956 that the Customs Court was an Article III court. *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), *overruled by*, *Glidden v. Zdanok*, 370 U.S. 530 (1962); Act of July 14, 1956, ch. 589, § 1, 70 Stat. 532; *see also*, Act of Aug. 25, 1958, P.L. No. 85-755, § 1, 72 Stat. 848 (declaring CCPA to be an Article III court). In the interim, the customs courts occupied an intermediate status above administrative agencies but clearly below full constitutional courts. Reed, *supra*, at 114.

In 1970, Congress passed the Customs Courts Act, which revamped and modernized procedures for traditional customs litigation. Under the 1970 Act, classification and appraisement challenge procedures were united and reformed. The Customs Court had exclusive jurisdiction over civil actions to review denied protests. Customs Courts Act of 1970, P.L. No. 91-271, § 110, 84 Stat. 274. The 1970 Act set forth seven types of decisions which were subject to protest, including appraisement and classification. *Id.*, *currently codified at*, 19 U.S.C. § 1514(a).

In the Customs Courts Act of 1980, Congress established the Court of International Trade ("CIT") as successor to the Customs Court. It established the exclusive jurisdiction of the CIT over cases in several import-related areas that had been heard in the district courts. The 1980 Act granted the CIT "all the powers in law and equity" of a district court. Customs Courts Act of 1980, P.L. No. 96-417, § 201, 94 Stat. 1727, 1729, *codified at*, 28 U.S.C. § 1585. The 1980 Act codified the existing *de novo* standard of review in traditional customs cases. P.L. No. 96-417, § 301, 94 Stat. at 1737, *codified at*, 28 U.S.C. § 2640(a). The 1980 Act permitted the CIT to enter money judgments, remand the action to the agency, or any other relief that is available in a district court. *Id.*, codified at 28 U.S.C. § 2643(c).

judicial or quasi-judicial bodies, whose independent nature was repeatedly emphasized. For example, in affirming a decision of the Board of General Appraisers, a predecessor body to the CIT, the Court of Customs Appeals held that the BGA was vested with judicial powers to determine the classification and duty which should be imposed. *United States v. Kurtz, Stuboeck & Co.*, 5 C.C.A. 144 (1914). Prior to the codification of *de novo* review by the Customs Courts Act of 1980, the courts considered the administrative practice of the Customs Service with respect to classification as only one of several factors to be examined in determining the correctness of the decision at issue. *See, e.g.*, *Semon Bache & Co. v. United States*, 17 C.C.P.A. 273 (1929). In that case, the Court of Customs and Patent Appeals held that "in determining the question from the record in the case," four major factors needed to be examined: "the testimony relative to the commercial designation; the judicial decisions; the administrative practice; and the legislative history of the tariff provision." *Semon Bache*, 17 C.C.P.A. at 274-275.

The Supreme Court has recognized the longstanding tradition of *de novo* review of Customs classification decisions. For example, in *Nix v. Hedden*, 149 U.S. 304 (1893), the Supreme Court affirmed a lower court's classification of tomatoes as vegetables. The lower court had reviewed the classification determination *de novo* and did not defer to the agency determination. By affirming the lower court's decision, the Supreme Court recognized that *de novo* review was appropriate in a classification decision. Similarly, in *Worthington v. Robbins*, 139 U.S. 337 (1891), the Supreme Court overruled the decision of the collector after making independent findings of fact. In that case, the Supreme Court announced a cardinal principal of customs jurisprudence: to wit, that merchandise must be appraised in its imported condition, and not, as the collector had done, on the basis of how it would ultimately be used.

In *United States v. Stone & Downer Co.*, 274 U.S. 225, 235 (1927), the Supreme Court held that the classification of merchandise by the government collector was not entitled to *res judicata* effect as to that merchandise. The Court noted that "objection to the practice [of disallowing *res judicata* effect] has

never been made before," and stated that this was "strong evidence not only of the wisdom of the practice but of general acquiescence in its validity." *Stone & Downer*, 274 U.S. at 238. The Court's refusal to grant determinative effect to the collector's classification strongly implies that the classification decision was not entitled to deference. In *Great Lakes Paper Co. v. United States*, 52 Cust. Ct. 64, 67 (1964), the Customs Court stated that "we consider it now to be settled law that *res judicata* constitutes no estoppel to a trial *de novo* and reconsideration on the merits for every entry of imported merchandise."

Congress' choice of *de novo* review in classification cases negates the fundamental presumption underlying *Chevron* deference that "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, ___, 116 S.Ct. 1730, 1733 (1996). In the area of tariff classification decisions, Congress did not desire the agency, rather than the CIT, to possess whatever degree of discretion an HTSUS provision allows. On the contrary, Congress created a specialized tribunal -- originally the BGA, then the Customs Court, and now the CIT (*see* note 5, *supra*) -- to render *de novo* adjudications of classification disputes. Since the BGA was itself an administrative tribunal within the Treasury Department, it was the body that Congress desired to possess full interpretive authority under the Tariff Schedules. When the BGA was renamed the Customs Court in 1926, its "powers . . . remain[ed] the same as by existing law provided." Tariff Act of May 28, 1926, ch. 411, 44 Stat. 669. When the Customs Court was renamed the CIT in 1980, Congress again expressed its intention that the standard of review in litigation under 28 U.S.C. § 1581(a) would remain the same as in existing law. 28 U.S.C. § 2640(a); H.Rep. No. 96-1235, 96th Cong., 2nd Sess., at 59, *reprinted in*, 1980 U.S.C.C. & A.N. at 3770. Hence, by its statutory authority to conduct *de novo* review, the CIT retains the power of the BGA to make the authoritative and independent

interpretations of the provisions of the tariff schedules.

The enactment of section 2640(a) not only reaffirmed the longstanding history of *de novo* review by the courts of classification decisions, it also differentiated such review from the review of other agency decisions charged with administering other laws related to the importation, exportation or admissibility of merchandise.[6] The reason for the difference in standards of review becomes obvious upon examination of the differences in the nature of the underlying administrative proceedings, as well as the nature of classification decisions themselves.

III. The Courts Below Do Not Exercise *De Novo* Review in Other Agency Decisions Governing Imports

A. Congress Has Recognized the Uniqueness of the *De Novo* Standard of Review of Customs Decisions

Just one year prior to the enactment of the Customs Courts Act of 1980, Congress passed the Trade Agreements Act of 1979 ("TAA"), which provided an explicit judicial standard of review of agency decisions in antidumping ("AD") and countervailing duty ("CVD") cases. Trade Agreements Act of 1979, P.L. No. 96-39, 96th Cong., 1st Sess., Title X, § 1001, 93 Stat. 144, *codified at*, 19 U.S.C. § 1516a. This new provision directed the court to hold unlawful:

> [A]ny determination, finding or conclusion found-
>
> (A) in an action brought under subparagraph (A), (B), or (C), of subsection (a)(1) [concerning reviews of certain determinations], to be arbitrary, capricious, an abuse of discretion, or otherwise

---

[6] The enactment of 28 U.S.C. § 2640(a), codifying *de novo* review of administrative decisions, does not preclude a court's giving some weight to the administrative decision, consistent with the *Semon Bache* case, 17 C.C.P.A. 273, discussed *supra*.

not in accordance with law, or

(B) (i) in an action brought under paragraph (2) of subsection (a) [concerning review of determinations on the record], to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.

19 U.S.C. § 1516a(b)(1). The Statement of Administrative Action accompanying the Trade Agreements Act further explains the limited scope of review of the courts in these subject matter areas:

> Any interested party who was a party to the proceedings may seek review by the Customs Court of (1) a final affirmative or final negative determination in a countervailing duty or antidumping duty investigation and (2) the Authority's periodic review of the amount of a countervailing or antidumping duty. An interested party to the proceedings who filed or supported a petition may seek review by the Customs Court of (1) a determination by the Authority to suspend an investigation upon acceptance of an agreement and (2) a determination by the ITC with respect to the elimination of injurious effect under an agreement pursuant to which an investigation has been suspended. A final affirmative determination by the Authority or the ITC may not be reviewed until after the publication of the countervailing duty or antidumping duty order based on those determinations.
>
> *The standard for judicial review of the above determinations is whether the determinations are not supported by substantial evidence on the record or are otherwise not in accordance with law.*

Trade Agreements Act of 1979, Statements of Administrative Action, H.R. Doc. No. 96-153, Part II, 96th Cong., 1st Sess. at 537-38 (1979), *reprinted in*, 1979 U.S.C.C. & A.N. 665, 783 (emphasis added). The Senate recognized the distinction between the revised standard of review in AD and CVD cases and that applicable to customs litigation in its description of the provisions of section 1001 of the Act, which both created a new standard of review in AD and CVD cases, and modified provisions regarding a challenge brought against a customs decision via the filing of a protest. In discussing the new AD and CVD standard of review, the Senate stated:

> Section 516A would remove all doubt on whether *de novo* review is appropriate [in AD and CVD cases] by excluding *de novo* review from consideration as a standard in antidumping and countervailing duty determinations. *De novo* review is both time consuming and duplicative. The amendments made by Title I of the Trade Agreements Act provide all parties with greater rights of participation at the administrative level and increased access to information upon which the decisions of the administering authority and the International Trade Commission are based. These changes, along with the new requirement for a record of the proceeding, have eliminated any need for *de novo* review.
>
> Section 516A would make it clear that traditional administrative law principles are to be applied in reviewing antidumping and countervailing duty decisions where by law Congress has entrusted the decision-making authority in a specialized, complex economic situation to administrative agencies. Thus, review of any determination listed in subsection (a)(1) would be to ascertain whether there was a rational basis in fact for the determination by the administrative decision-

> maker. Review of determinations listed in subsection (a)(2) would proceed upon the basis of a formal administrative record and the standard of review provided is "unsupported by substantial evidence on the record or otherwise not in accordance with law."

S. Rep. No. 249, 96th Cong., 1st Sess., at 251-52 (1979), *reprinted in*, 1979 U.S.C.C. & A.N. 381, 637-638; *see also*, H.R. Rep. No. 317, 96th Cong., 1st Sess., at 180-181 (1979)(AD and CVD review). In contrast, the Senate reaffirmed that the change to the Customs Service's protest procedures was not intended to affect *de novo* review of those decisions by the courts.

> *The bill.*—Section 1001(b)(2) of the bill would amend section 515(a) [providing for importer protests] so as to require the Customs Service to include reasons in its notice of denial of a protest as well as a statement that the importer may file a civil action in the Customs Court to contest the denial.
>
> *Reason for the provision.*—This amendment conforms United States law to the obligation found in Article 11.3 of the MTN Customs Valuation Agreement. *This provision is not intended to change existing law to the effect that an importer is otherwise entitled to a trial de novo. In addition, this provision gives statutory effect to existing practice and is in no way intended to change existing law.*

S. Rep. No. 249, at 253-54, *reprinted in*, 1979 U.S.C.C. & A.N. at 639-40.

Thus, in contrast to the mandated *de novo* review of classification decisions, Congress authorized a review of agency determinations in AD and CVD cases that was limited to the

agency record and which could only be overturned if the decision of the agency was not supported by substantial evidence or otherwise not in accordance with law. In the enactment of the Customs Courts Act a year later, Congress again noted the difference:

> Proposed section 2640(a)(1) specifies the scope and standard of review applicable in a civil action commenced in the Court of International Trade.
>
> Subsection (a)(1) provides for a trial *de novo* in the Court of International Trade in a civil action commenced pursuant to section 515 of the Tariff Act of 1930. *This provision restates existing law.*

H.Rep. No. 96-1235, 96th Cong., 2nd Sess., at 59, *reprinted in*, 1980 U.S.C.C. & A.N. at 3770 (emphasis added).

> In contrast the House Report goes on to note that:
>
> [Proposed subsection 2640(b)] provides that the Court of International Trade shall review a civil action commenced under section 516A of the Tariff Act of 1930, as specified by subsection (b) of that section.

H.Rep. No. 96-1235, at 59, *reprinted in*, 1980 U.S.C.C. & A.N. at 3771.

B. The Different Standards of Review for Classification and AD/CVD Cases Are Logical Given the Different Nature of the Proceedings

1. Classification Decisions Are Not Supported By Complete Administrative Records

The difference in standards of review as reflected in the TAA of 1979 and the Customs Court Act of 1980 is logical—review of agency AD/CVD determinations is more limited than review of tariff classification determinations because the two types of administrative proceeding are so markedly different.[7] First, AD/CVD determinations are supported by a statutorily required administrative record. The AD/CVD parties have an opportunity at the agency level for notice, hearing and other due process procedures. *See*, S. Rep. No. 249, at 251-52, *reprinted in*, 1979 U.S.C.C. & A.N. at 637-638 (greater rights of participation at administrative level and record requirement given as reasons for providing "substantial evidence" standard of review of AD and CVD decisions). By contrast, the "record" in tariff classification cases frequently is comprised of a one-page protest form prepared by the importer on which the agency has checked the "denied" box or, at best, supported by a ruling letter issued by the Customs Service that is binding only on the parties to the decision. Generally, these rulings letters are brief and contain summary accounts of the facts to which they apply. Therefore, even if published, another importer who chooses to rely on such

[7] The government cites to the Supreme Court's decision in *Zenith Radio Corp. v. United States*, 437 U.S. 43 (1978) at p. 21 of its brief as supporting its proposition that "formal Treasury interpretations of tariff legislation are to be accorded 'considerable weight' in customs litigation" and that "such specialized courts" "are to 'show great deference to the interpretation given the statute by the officers or agency charged with its administration'." However, the *Zenith* Court was not concerned with classification decisions of the agency, but was reviewing a countervailing duty determination, which, as Congress made clear in its 1979 enactment, should be given deference.

a decision does so at his own risk. Likewise, there is essentially no record when the Customs Service makes a decision under an interpretive regulation.

Moreover, the importer seeking a tariff classification decision does not enjoy due process procedures and safeguards. In fact, there is no public notice of the consideration of an issue by Customs, except in rare instances where Customs has initiated a proposal to review its position in a specific area and seeks to issue an interpretive ruling. These instances, however, are rare. Thus, judicial review of AD/CVD determinations is limited to review of the administrative record with deference to agency determinations made in that record. On the other hand, the CIT may "order a retrial or rehearing for all purposes" if it is unable to arrive at the correct determination in a classification case.

2. Classification Decisions Are Governed by the General Rules of Interpretation to the Harmonized Tariff Schedules of the United States

In addition, the nature of a classification determination itself differs from an AD/CVD determination. While an AD/CVD determination is governed by a statutory framework that explicitly requires the administering agency to make interpretations and fill gaps, a classification determination requires application of a highly detailed statute consisting of thousands of statutory line items with its own internal notes and rules of interpretation. As the drafters of the internationally harmonized tariff nomenclature have explained:

> [t]o be completely sound, a classification system must associate each individual product with *a single heading* (and, as the case may be, subheading), to which that product can be simply and unequivocally assigned. Hence it must contain *rules designed to ensure that a given product is always classified in one and the same*

heading (and subheading) to the exclusion of any others which might appear to merit consideration.[8]

Thus, the Customs Co-operation Council recognized that, while there may appear to be a range of "reasonable" classifications for a particular product, there can be one and only one correct classification under the Harmonized Tariff Schedule.

This difference is reflected in the HTSUS itself. The HTSUS contains six General Rules of Interpretation ("GRIs"), taken verbatim from the international HTS nomenclature, plus one "Additional U.S. Rule of Interpretation." Taken together, these rules provide a logical, step-by-step method for determining the classification of goods under the HTSUS, and are intended to ensure that all imported goods can be assigned to a single tariff provision to the exclusion of other potentially applicable provisions. For example, the HTSUS provides that, in the event that a product cannot be classified by reference to other GRIs, the product shall be classified under the heading which occurs last in numerical order among those that equally merit consideration.[9] In other words, there are no "gaps" into which an agency may insert its reasonable determinations. The HTSUS allows for only a single correct answer. Thus, classification decisions must result in a uniform interpretation of the tariff schedule, and importers must be able to rely on court decisions which provide guidance as to the correct interpretation of tariff terms.

The government has argued, that by denying *Chevron* deference to the agency's interpretive regulations "the ultimate application of customs provisions could not be determined until completion of a cumbersome, case-by-case inquiry to obtain an ad hoc judicial 'balancing [of] the relevant factors.'" Petitioner's

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[8] Customs Co-operation Council, *Introducing the International Convention on the Harmonized Commodity Description and Coding System*, at 29 (Brussels, 1983) (emphasis added). The HTSUS is the U.S. enactment of the Harmonized Commodity Description and Coding System.

[9] General Rule of Interpretation 3(c), HTSUS.

brief at 21. The government goes on to postulate that since the CAFC has already acknowledged that the list of "relevant factors" may vary from case to case, it becomes an inherently subjective inquiry, and that "different triers of fact could reach different results on similar sets of facts." In Note 9 at p. 22 of its brief, the government asserts that since the Customs Service is required to make thousands of classification decisions on a daily basis in order to keep trillions of dollars of trade moving efficiently, it is most unlikely that Congress would have sought to deprive the agency of the "ordinary administrative authority to provide guidance to the public and its own officers by means of the interpretative regulations that Congress authorized the agency to adopt."

The government's argument is without merit. First and foremost, the Regulation is a rare anomaly within the realm of tariff classification. As noted above, the HTSUS includes thousands of provisions classifying the countless articles which enter the United States. The drafters of the HTSUS provided chapter and section notes and rules of interpretation to ensure uniformity in classification decisions. Congress never intended to burden the agency with the responsibility for issuing interpretative regulations for each and every tariff provision, and, as noted above, the Customs Service, ordinarily, will issue ruling letters that are legally binding only on the parties to whom they were issued. This longstanding administrative process of issuing binding rulings on specific factual scenarios is mandated by the hierarchy of GRI's as discussed above. Since there can only be one correct classification determination for a given importation, it would be illogical to try to interpret the scope of each tariff provision in an abstract manner. The government asks deference be given to a regulation requiring 'hat, by definition, permapressing be deemed not to be incidental to assembly because it imparts new characteristics to fabric treated in that manner. However, would the same interpretation be "reasonable" if the permapressing were applied to only one component of an assembled garment, such as a collar? The clear absurdity of applying this regulation in the example of a garment imported

with very limited permapressing is in harmony with the regular administrative practice of issuing rulings of limited application which are binding only as to the precise facts discussed in the ruling letter and only as to the parties involved in the transaction reviewed. It also lends further support to our argument that it would be contrary to the express intent of Congress as set forth in the statutory framework discussed above, to require that the Customs Service's decisions in classification cases be entitled to deference.

IV. The Requirement in 28 U.S.C. § 2643(b) That the Court of International Trade Reach a Correct Decision Is a Statutory Requirement That Is Unique to That Court

The government argues that the courts below erred in relying on the provisions of 28 U.S.C. § 2643(b) in deciding that the Regulation was not entitled to deference for two reasons: First, because it argues that "*all* courts are obviously charged with the responsibility of 'reach[ing] the correct decision' in the cases that come before them." Petitioner's brief at 15 (emphasis in original). Second, the government argues that this provision "does nothing more than provide various procedural options for the Court of International Trade when that court is not satisfied with the state of the evidentiary record in the case before it." *Id.* The government's argument is wrong on both counts. With respect to the language of the provision itself, our search of the United States Code has revealed not a single other instance in which this language to "reach the correct decision" is found with respect to the scope or standard of review of an agency action by a federal court. Further, the government's argument that this provision merely provides for various procedural options that can be exercised by the CIT is also wrong. In fact, it allows the court to consider issues not raised by either party and thereby reach a result that is substantively different from any result advocated by any of the parties appearing before it.

This interpretation was made clear by the CAFC in its decision in *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70,

733 F.2d 873 (1984). The CAFC noted that the trial court, in deciding the proper tariff classification of mining cars in favor of the government, did not consider the correctness of the government's tariff classification. Instead the trial court found that the plaintiff had failed to establish the correctness of its claims as a matter of law, and that the plaintiff had not overcome the presumption of correctness[10] attaching to the tariff classification decision of the Customs Service. The CAFC discussed the history of dual burden of proof imposed upon a plaintiff challenging a Customs Service classification of imported goods, which required that the importer prove that the classification found by the government was incorrect and that the claimed tariff classification was correct. The CAFC observed that, prior to the Customs Courts Act of 1980, unless an importer proved that the classification of the Customs Service was incorrect, and, in addition, that the claimed classification was correct, the incorrect classification of the government would stand. The CAFC determined that such a result, after the changes made to the court's powers by the 1980 Act, was untenable, stating that "when the Customs Service is unable to determine where an item belongs in the tariff schedules, it is anomalous to demand that the importer provide the correct answer." *Jarvis Clark*, 2 Fed. Cir. (T) at 75, n. 3, 733 F.2d at 876, n.3.

The CAFC found that 28 U.S.C. § 2643(b) empowered the CIT to reach the correct decision regarding the tariff classification, rather than let stand undisturbed an erroneous Customs decision. *Jarvis Clark, 2 Fed. Cir. (T) at 75, 733 F.2d at 878.* The court buttressed its conclusion by reference to the legislative history in which the Congress had declared that:

> Subsection (b) has particular impact on civil actions brought pursuant to section 515 and 516 of the Tariff Act of 1930. Under existing law, for

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[10] The presumption of correctness, codified at 28 U.S.C. § 2639(a), may be regarded as the Congressional preemption of deference, as discussed below.

example, in a civil action commenced under the court's jurisdiction to entertain cases involving the classification or valuation of merchandise, if the plaintiff succeeds in demonstrating that the original decision of the Customs Service was incorrect, but is unable to establish the correct classification or valuation, the court dismisses the civil action. In effect, the court holds in favor of the United States even though the plaintiff has demonstrated that the challenged decision of the Customs Service was erroneous. *Subsection (b) would permit the court in this situation to remand the matter to the Customs Service to make the correct decision or schedule a new trial or rehearing so that the parties may introduce additional evidence.*

H.Rep. No. 96-1235 at 60-61, *reprinted in*, 1980 U.S.C.C. & A.N. at 3772 (emphasis added).

Thus, Congress intended that the court retain jurisdiction over the matter until a correct tariff description was determined. Under the provision, the court may find in favor of the government or the importer. However, the court may also find the correct classification under a totally different provision where appropriate. The court is thus empowered to classify the merchandise before it under a tariff provision with a duty rate higher than the rate originally assessed by the Customs Service, in which case the importer may be required to pay additional duties as a result of the court's reaching the correct decision. Conversely, the court may find that the correct rate of duty is less than the amount claimed by the importer to be correct, in which case, the refund of duty would be more than the amount claimed by the importer.

These possibilities are directly related to the mandate of 28 U.S.C. § 2643(b) to reach the correct decision, as proscribed

under the interpretive rules of the tariff schedules.[11] Since, as noted above, there can only be one correct decision, as implicitly recognized in the language of § 2643(b), that provision represented an important procedural change, as well an added substantive change in the law because this statute changed the rights of recovery flowing from the enactment of the Customs Courts Act of 1980. Therefore, the government's argument that this very critical language is merely reflective of the duties of any court, and provides for nothing more than some procedural options is unsupported. Contrary to the government's statement at pp. 16-17 of its brief, that "this statute does not provide, either in words or by plausible inference, that the traditional rule of deference to agency interpretations has no role in tariff classification disputes," the statute does make such deference inconsistent with the plain reading of the statute. As has been often noted, the *Chevron* doctrine contemplates a range of reasonable interpretations. However, the statutory framework of the jurisdiction of the CIT, as well as the tariff schedules are both inapposite to the notion of multiple choices. It bears repeating that there can only be one correct answer in a classification decision.

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[11] The CIT has, in fact, reached decisions different from the positions advanced by either party. For example, in *Hewlett-Packard v. United States*, Slip Op. 98-76, 1998 Ct. Intl. Trade LEXIS 75 (CIT, June 12, 1998), the CIT classified merchandise in a provision not claimed by either party. The government had classified pen plotters as drawing instruments under HTSUS subheading 9017.20.8090 and the importer had asserted that the proper classification was as automatic data processing machines under subheading 8471.92.9060. The court determined that the correct classification was as printer units incorporating at least the media transport, control and print mechanism under subheading 8471.92.6580.

V. The Presumption of Correctness Applicable to Customs Service Decisions Further Reflects Congress' Intention that Such Decisions Not Be Accorded *Chevron* Deference

The statutory presumption of correctness, codified at 28 U.S.C. § 2639(a)(1), is an evidentiary rule that shifts the burden to the party challenging the Customs Service decision to come forth with evidence sufficient to rebut that presumption. If the presumption is successfully rebutted, then the burden shifts to the Customs Service to support its determination. This presumption is in harmony with the statutory requirements of 28 U.S.C. § 2640(a) and 28 U.S.C. § 2643(b) as discussed above, in that it furthers the objectives of those provisions which require that the reviewing court exercise independent judgment and reach a correct decision.

This presumption is quite unusual in Federal law. Our research has revealed only three other areas in which a similar presumption of correctness applies. *See*, 28 U.S.C. § 2254(e)(1) (determinations of factual issues by state courts in *habeas corpus* proceedings are "presumed to be correct"), 26 U.S.C. § App. Tax Court Rule 183 (findings of fact by special trial judge are presumed to be correct); and, 29 U.S.C. § 1401(a)(3) (certain determinations by ERISA plan sponsors presumed correct). The uniqueness of the provision is an important part of the development of judicial review of customs determinations, and has a long history. However, this presumption of correctness does not incorporate judicial deference to administrative decisions. In *Universal Electronics v. United States*, __ Fed. Cir. (T) ___, 112 F.3d 488 (1997), the CAFC held that the presumption of correctness should never be construed as a means to afford deference to the agency's interpretation of the law. *Universal*, 112 F.3d at 492. A "presumption" does not generally affect the amount of deference applicable to the review of agency decisions. According to Federal Rule of Evidence 301, a "presumption imposes . . . the burden of going forward with evidence to rebut or meet the presumption, but does not shift . . .

the burden of proof in the sense of the risk of non-persuasion." *See also, e.g.*, 21 Wright and Graham, *Federal Practice and Procedure*, § 5123, at 579-80, nn. 27, 29, and 33 (giving examples of presumptions that do not encompass deference under Federal law).

The presumption of correctness may trace its origins back to the case of *Earnshaw v. United States*, 146 U.S. 60, 63 (1892), in which the Supreme Court stated that the action of customs appraisers is entitled to the benefit of the general rule "that some presumption is to be indulged in favor of the propriety and legality" of the action of quasi-judicial tribunals. *See also*, *United States v. National Starch Products*, 50 C.C.P.A. 1, 4 n.4, C.A.D. 809, 318 F.2d 737, 740 n.4 (1962), *citing*, *Arthur v. Unkart*, 96 U.S. 118 (1877) (placing burden of proof in challenge to the Custom's classification on importer challenging classification).

The purpose of the presumption has been found to be to impart stability to Customs Service rulings by inhibiting importers from filing appeals merely in order to require the government to come forward with justification of its action. *Anhydrides & Chemicals, Inc., v. United States*, __ Fed. Cir. (T) __, __, 130 F.3d 1481, 1485-86 n.2 (1997), *citing*, *Aluminum Co. of America v. United States*, 60 C.C.P.A. 148, 151, C.A.D. 1102, 477 F.2d 1396, 1399 (1973). The CIT and the CAFC have regularly noted the presumption in their discussions of the level of deference to Customs Service tariff classification decisions. *See, e.g., IKO Industries, Ltd. v. United States*, ___ Fed. Cir. (T) ___, ___, 105 F.3d 624, 626 (1997) (Customs Service did not acquire *Chevron* deference by resorting to the long-standing presumption of 28 U.S.C. § 2639(a)(1)).

The presumption of correctness, in effect, gives the Customs Service an evidentiary assist in defending its actions in the CIT. The presumption of 2639(a)(1) does not add evidentiary weight; it simply places the burden of proof on the challenger. Thus, it may be seen as a statutory form of deference provided to the Customs Service because of the *de novo* nature of the review performed by the CIT. Without the presumption, the government would be required to prove all of the facts necessary to its

decision. With the presumption, importers challenging Customs Service decisions are required to put forth sufficient credible evidence to overcome the presumption. Therefore, the presumption of correctness is part and parcel with the *de novo* review performed by the CIT.

VI. The Courts Below Correctly Determined That The Regulation At Issue Should Not Be Given Deference Because It Was In Conflict With The Statute

Notwithstanding the statutory framework discussed above, which, we submit, makes it impossible to defer to the Customs Service in the manner contemplated by the *Chevron* decision, the courts below, did, in fact, consider whether the Regulation was consistent with the underlying statute, and ultimately, found that it was contrary to the statute. Accordingly, the courts properly considered the administrative practice, but rejected that practice because it was found to be violative of the statute.

Contrary to the position taken in the government's brief at 27-28, the courts below did not conclude that the "regulation precludes every operation that 'impart[s] new characteristics' to an article from being regarded as 'incidental to assembly'." The lower courts did not overrule the Regulation on the premise that *any* process imparting a new characteristic would fail under the Regulation. To the contrary, the CIT found only that the Regulation, by disqualifying the permapressing operation at issue herein as an operation incidental to assembly, was contrary to the statute, because the Regulation deemed that permapressing was never a permissible incidental operation, regardless of its cost, or relationship to the associated assembly process, solely because it imparts new characteristics to the fabric. *Haggar Apparel Co. v. United States*, 20 CIT ___, ___, 938 F. Supp. 868, 874 (1996).

Section 10.16(c)(4) specifically states that: "[c]hemical treatment of components or assembled articles *to impart new characteristics, such as* showerproofing, *permapressing*, sanforizing, dying or bleaching of textiles [is not considered

incidental to the assembly]." 19 C.F.R. § 10.16(c)(4) (1998) (emphasis added). The courts below each found that this portion of the regulation was in conflict with the statute. The CIT found explicitly that "10.16(c) conflicts with the plain language of item 807.00,"[12] because the law "does not prohibit operations which merely impart new characteristics to the article being assembled as the regulation provides, but in fact permits a duty allowance for such improvements to the articles so long as the operation imparting those characteristics was incidental to assembly." *Haggar Apparel Co. v. United States*, 20 CIT at ___, 938 F. Supp. at 874. In affirming, the Court of Appeals cited the CIT's "thorough" opinion, in effect adopting its reasoning. *Haggar Apparel Co. v. United States*, __ Fed. Cir. (T) ___, ___, 127 F.3d 1460, 1461 (1997).

Although the CIT referred to § 10.16(c) generally, the facts of the case and its citation to the "imparts new characteristics" language make clear that its holding was limited to the permapressing exemplar. This holding is in accord with established Supreme Court case law on the issue of deference to administrative regulations which conflict with the statutes they interpret. Where an administrative action conflicts with the statutory language, the action is not accorded *Chevron* deference. *See, e.g., Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446-448 (1987) (Court refused to apply *Chevron* deference to decision found to be inconsistent with statute); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988) (Customs Service regulation held to be invalid where it "conflict[ed] with the unequivocal language of the statute"); *Ohio Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989) ("But, of course, no deference is due to agency interpretations at odds with the plain meaning of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.")

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[12] Item 807.00 is the predecessor provision to subheading 9802.00.80, HTSUS.

Chevron itself recognizes this in the first question posed under that case's analysis. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

In this case the Regulation does in fact contravene the statutory language given by Congress. Employing traditional tools of statutory construction, it is clear that the Regulation prohibits an action that would otherwise be permissible under the law. Logically, permapressing may chemically "impart new characteristics" to assembled goods, yet may still be "incidental to assembly," under certain facts. Yet, the Regulation would preclude any and all permapressing operations from qualifying under the statute, even those that are insignificant, which are related to the assembly process and would otherwise qualify under the "incidental to assembly" definition provided in 19 C.F.R. § 10.16(c). Indeed, that was the finding of the trial court herein. It would be inconsistent with the statute to refuse to allow a claim for duty allowance because it involved permapressing that might qualify under the statute, but would fail under § 10.16(c)(4). As *Chevron* teaches, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. 843, n. 9. The Court must do so here, where the Regulation clearly contravenes the language Congress used.

VII. No Deference is Required Because The Regulation Was Promulgated Solely to Provide Guidance

The courts below were also correct in declining to give deference to the Regulation, because it was issued as an interpretive regulation, which was simply intended to provide guidance to the importing public, and was never intended to fill a legislative void. The Customs Service, in its own words, indicated to the public that it never intended for the courts to give deference to the factual determinations made in the Regulation,

because it was enacted solely to provide non-binding advisory guidance to importers. In the preamble to the regulatory subchapter providing for a reduction in duties applicable to articles assembled abroad with U.S. components, the Customs Service explicitly stated that the Regulation was being issued solely to provide examples and definitions.

> Sections 10.12 through 10.23 set forth definitions and interpretative regulations adopted by the Commissioner of Customs pertaining to the construction of item 807.00, Tariff Schedules of the United States (19 U.S.C. 1202) and related provisions of law. . . . The definitions and regulations that follow are promulgated to inform the public of the constructions and interpretations that the United States Customs Service shall give to relevant statutory terms and to assure the impartial and uniform assessment of duties upon merchandise claimed to be partially exempt from duty under item 807.00, Tariff Schedules of the United States (19 U.S.C. 1202), at the various ports of entry. *Nothing in these regulations purports or is intended to restrict the legal right of importers or others to a judicial review of the matters contained therein.*

19 C.F.R. § 10.11 (1976) (emphasis added). By its own terms, the Regulation is not "intended to restrict" importers' rights to "judicial review of the matters contained therein." The Regulation was issued, therefore, with the explicit recognition that it was an "interpretive rule," as opposed to a "legislative rule." It has been long recognized that interpretive rules do not have the force of law, *i.e.*, they are subject to challenge in agency enforcement proceedings and are not entitled to the same degree of judicial deference as legislative rules. *See*, Administrative Conference of the United States, *A Guide to Federal Agency Rulemaking* (2nd Ed., 1991), at 63, *citing*, *Skidmore v. Swift &*

Co., 323 U.S. 134, 140 (1940), and, *National Latino Media Coalition v. FCC*, 816 F.2d 785, 788 (D.C. Cir. 1987). As the Court stated in *Skidmore*, "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. at 140.

CONCLUSION

Based on the foregoing, CITBA, *amicus curiae*, urges this Court to affirm the decisions of the courts below.

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